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Reconsidering the Constitutionality of Federal Sentencing Guidelines After *Blakely*: A Former Commissioner's Perspective

Michael Goldsmith[*]

Our cases have made abundantly clear that a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed.
—United States Supreme Court[**]

On June 24, 2004, the United States Supreme Court issued a 5–4 decision that called into question the constitutionality of the federal sentencing guidelines. *Blakely v. Washington* ruled that a trial court's upward departure from the penalty range ordinarily prescribed by state law deprived defendant Ralph Howard Blakely Jr. of his Sixth Amendment right to have a jury determine all facts essential to his sentence beyond a reasonable doubt.[1] Observing that "[p]etitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with 'deliberate cruelty,'"[2] Justice Scalia's majority opinion concluded that "[t]he Framers would not have thought it too much to demand that, before

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Professor Goldsmith also wishes to thank the BYU Library reference staff (Ron Fuller and Galen Fletcher, in particular) for providing outstanding support. Additionally, Todd Jenson worked tirelessly researching and compiling an almost daily compendium of post-*Blakely* cases. Finally, special thanks to Ellen Basian, Ph.D.

** Libretti v. United States, 516 U.S. 29, 49 (1995).

1. 124 S. Ct. 2531, 2538 (2004), *reh'g denied*, No. 02-1632, 2004 U.S. LEXIS 4887 (Aug. 23, 2004).

2. *Id.* at 2543.

depriving a man of three more years of his liberty, the State should suffer the *modest inconvenience* of submitting its accusation to the 'unanimous suffrage of twelve of his equals and neighbours . . . .'"[3]

Blakely's immediate impact proved to be more than a "modest inconvenience." Because Washington's determinate sentencing scheme contained features facially comparable to the federal sentencing guidelines, *Blakely* threatened the legal foundation upon which federal courts have sanctioned offenders since the Sentencing Reform Act of 1984[4] ("the SRA") took effect. The decision provoked an "avalanche"[5] of motions challenging the constitutionality of the federal sentencing guidelines, and judicial opinions nationwide characterized its effects as "cataclysmic."[6]

The majority of federal district courts ruled that *Blakely* rendered the federal sentencing guidelines unconstitutional insofar as the SRA required judges to impose sentences based on facts beyond those

3. *Id.* (emphasis added) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *343). The reference to Blackstone is both ironic and inapt. Blackstone wrote during a period in which most felonies were punishable by death or banishment and the jury played no role in sentencing. *See* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 36–37 (1983); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 316 (2003); *see also infra* note 168 and accompanying text.

4. Pub. L. No. 98-473, 98 Stat. 1837, 1987 (1984) (codified at 18 U.S.C. §§ 3551–59 (2003); 28 U.S.C. §§ 991–98 (2003)).

5. United States v. Booker, 375 F.3d 508, 509 (7th Cir. 2004), *cert. granted*, 73 U.S.L.W. 3073, 3074, 2004 WL 1713654 (U.S. Aug. 2, 2004).

6. United States v. Croxford, 324 F. Supp. 2d 1230, 1232 (D. Utah 2004) (describing *Blakely* as "potentially cataclysmic"); *see, e.g.*, United States v. Ameline, 376 F.3d 967, 973 (9th Cir. 2004) ("[T]he *Blakely* Court worked a sea change . . . ."); United States v. Zompa, 326 F. Supp. 2d 176, 176 (D. Me. 2004) (noting a "flurry of judicial activity surrounding the *Blakely* decision"); U.S. v. Shamblin, 323 F. Supp. 2d 757, 768 (S.D.W.V. 2004) (predicting that *Blakely* would create an "upheaval" in federal courts).

The response from the legal community has involved even more colorful adjectives. *See, e.g.*, Laurie P. Cohen & Gary Fields, *Legal Quagmire: High Court Ruling Unleashes Chaos Over Sentencing*, WALL ST. J., July 14, 2004, at A1; Dan Eggen & Jerry Markon, *High Court Decision Sows Confusion on Sentencing Rules*, WASH. POST, July 13, 2004, at A1 ("'*Blakely* is like an earthquake' . . . ." (quoting Professor Berman)); Carol D. Leonnig & Neely Tucker, *U.S. Judge Cuts Farmer's Sentence in Mall Standoff*, WASH. POST, July 1, 2004, at A01 ("The Supreme Court decision [*Blakely*] . . . has been a bombshell for federal prosecutors across the country . . . ."); Adam Liptak, *Justices' Sentencing Ruling May Have Model in Kansas*, N.Y. TIMES, July 13, 2004, at A12 ("The decision [*Blakely*] has caused 'the legal equivalent of a 40-car pileup' . . . ." (quoting Margaret Love, former Justice Department official)); Christopher Smith, *Hatch Exploring a "Fix" for Sentencing Turmoil*, SALT LAKE TRIBUNE, July 14, 2004, at A1 ("turmoil").

necessarily contained in the jury's guilty verdict;[7] the circuit courts, however, divided sharply.[8] The Supreme Court granted *certiorari* to address this issue and, because of its importance, placed the matter on an expedited briefing schedule.[9]

As a former member of the United States Sentencing Commission, I viewed these developments with special interest and concern. The Supreme Court had sustained the constitutionality of the federal guidelines well before I became a commissioner in 1994[10] and several times afterwards as well.[11] Nevertheless, the post-*Blakely* fallout caused me to reexamine this issue. Although concerned that the Commission on which I had served might be found constitutionally untenable, I approached this reassessment buoyed by Justice Jackson's historic display of wisdom in acknowledging error on a prior occasion:

> Precedent . . . is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable . . . . Chief Justice

7. *See* United States v. Pirani, No. 03-2871, 2004 U.S. App. LEXIS 16117, at *31 n.5 (8th Cir. Aug. 5, 2004) *vacated for reh'g en banc*, 2004 U.S. App. LEXIS 17012 (8th Cir. Aug. 16, 2004) (noting that a "vast majority of [district] courts read *Blakely* as applicable to the Guidelines"). Initial district court decisions almost unanimously ruled that *Blakely* rendered the federal sentencing guidelines unconstitutional as applied. *See* United States v. King, 328 F. Supp. 2d 1276, 1280 (M.D. Fla. 2004); United States v. Harris, No. 03-244-03, 2004 WL 1622035, at *565 (W.D. Penn. July 16, 2004) ("[T]his Court has declared the United States Sentencing Guidelines unconstitutional under *Blakely* . . . ."); United States v. Einstman, 325 F. Supp. 2d 373 (S.D.N.Y. 2004); *Croxford*, 324 F. Supp. 2d at 1230. *Contra* United States v. Khan, 325 F. Supp. 2d 218 (E.D.N.Y. 2004); *but see* United States v. Emmenegger, No. 04 CR. 334 (GEL), 2004 U.S. Dist. LEXIS 15142 (S.D.N.Y. Aug 4, 2004).

8. *Compare Pirani*, 2004 WL 1748930, *Ameline*, 376 F.3d at 980 (striking down guidelines as applied), *and Booker*, 375 F.3d at 515 (same), *with* United States v. Reese, No. 03-13117, 2004 WL 1946076, at *4 (11th Cir. Sept. 2, 2004) ("[W]e decline to conclude that *Blakely* compels an alteration of the established view . . . [that the] minimum and maximum sentence[s] provided in the United States Code . . . [is] the only Constitutionally relevant maximum sentence."); United States v. Koch, No. 02-6278, U.S. App. 2004 WL 1899930, *2 (6th Cir. Aug. 26, 2004) (en banc) ("We now join . . . in determining that *Blakely* does not compel the conclusion that the Federal Sentencing Guidelines violate the Sixth Amendment."); United States v. Mincey, 380 F.3d 102, 106 (2d Cir. 2004) ("[U]ntil the Supreme Court rules otherwise, the courts of this Circuit will continue fully to apply the Guidelines."); United States v. Hammoud, 378 F.3d. 426 (4th Cir. 2004) (noting that *Blakely* does not invalidate sentences imposed under the Guidelines), *aff'd*, No. 03-4253, 2004 WL 2005622 (en banc) (Sept. 8, 2004); United States v. Pineiro, 377 F.3d 464, 470–71 (5th Cir. 2004) (declining to rule the guidelines unconstitutional and awaiting Supreme Court review).

9. United States v. Fanfan, No. 04-105, 2004 WL 1713655 (Aug. 2, 2004); United States v. Booker, No. 04-104, 2004 WL 1713654 (Aug. 2, 2004).

10. *See* Mistretta v. United States, 488 U.S. 361, 412 (1989).

11. *See infra* Part IV.A.

> Taney recant[ed] views he had pressed upon the Court . . . . Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, "The matter does not appear to me now as it appears to have appeared to me then." . . . And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: "My own error, however, can furnish no ground for its being adopted by this Court . . . ."[12]

If these pillars of our jurisprudence could confess error, surely I could candidly reexamine the legality of a sentencing system that I had helped to implement. This Article represents the product of that review. It advances the position that, notwithstanding *Blakely*, the federal sentencing guidelines are constitutional. Rather than focus exclusively on the *Blakely* majority opinion, this conclusion is based on both the full spectrum of Supreme Court sentencing precedent and systemic differences that distinguish the federal sentencing guidelines from Washington's statutory scheme.

Part I briefly describes the origin of federal sentencing reform and examines the oft-misunderstood relationship between the federal guidelines and mandatory minimum sentences. Part II.A explains how institutional tensions between the legislative and judicial branches of the federal government may have contributed to the *Blakely* controversy; Part II.B sets forth the legal grounds underlying *Blakely* and discusses a high-profile district court decision illustrative of many of the opinions applying *Blakely* to the federal sentencing guidelines. Part III reviews Supreme Court precedent upholding the constitutionality of various federal guideline provisions and concludes, based on more than a decade of Supreme Court jurisprudence, that structural and other differences distinguish the federal guidelines from the Washington statutes found problematic in *Blakely*. For those who look forward to the Supreme Court striking down the guidelines under *Blakely*, Part IV considers life

12. McGrath v. Kristensen, 340 U.S. 162, 178 (1950) (Jackson, J., concurring) (footnotes omitted). Justice Jackson further elaborated:

> Perhaps Dr. Johnson really went to the heart of the matter when he explained a blunder in his dictionary—"Ignorance, sir, ignorance." But an escape less self-deprecating was taken by Lord Westbury, who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his Lordship: "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion." If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all.

Id.

without the federal sentencing guidelines. It suggests that Congress would probably fill the void with a strict regime of mandatory minimum sentences likely to make critics of the current federal system wax nostalgic for "the good old days" of guideline sentencing.

Notwithstanding the many post-*Blakely* decisions that have declared the federal guidelines unconstitutional as applied, the Supreme Court's resolution of this issue remains uncertain. As at least one federal judge has observed in addressing post-*Blakely* issues, in law almost nothing is a "sure thing":

> The predictions of the Guidelines' demise are many and they may well be true. It is difficult to read *Blakely* and not see the same wrecking ball heading directly for the sentencing features of the [Sentencing Reform] Act of 1984. But predictions don't always hold; even sure things sometimes surprise us. Just last October, thousands of Chicago Cubs fans were certain of their team's first World Series appearance in ninety-five years, with a mere five outs to make against the Florida Marlins. Then one of the Cubs' own fans interfered with the catch of a foul ball, and the unraveling began. . . . [T]he Sentencing Guidelines may similarly defy . . . expectations . . . . A distinction, however fine, may be drawn between the[m] . . . and the State of Washington's Guidelines. Other issues could become involved. . . . And so on.[13]

With this in mind, I set out to explain why the federal guidelines' constitutional critics will likely meet the same fate as fans of the Chicago Cubs.

I. FEDERAL SENTENCING REFORM LIMITS JUDICIAL DISCRETION

Prior to 1984, federal judges enjoyed wide discretion in sentencing offenders.[14] A judge could impose any punishment within the statutory maximum and still stand virtually immune from appellate review.[15] Unlimited judicial discretion, however, produced unwarranted disparities—both nationwide and even within judicial districts—in sentences imposed upon similarly situated offenders.[16]

13. United States v. Olivera-Hernandez, 328 F. Supp. 2d 1185, 1185 (D. Utah 2004).

14. *See, e.g.*, *Mistretta*, 488 U.S. at 363.

15. *Id.* at 364 (noting that sentencing determinations received "virtually unconditional deference on appeal").

16. *Id.* at 366; *see, e.g.*, Anthony Partridge & William B. Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges* 1–3 (1974) (stating "the absence of consensus is the

For a nation grounded in equal justice, this situation proved intolerable. After extensive review, Congress responded by enacting the Sentencing Reform Act of 1984.[17]

The SRA had two goals: (1) removing unwarranted disparities in sentencing, and (2) producing "truth in sentencing" by eliminating parole, which had allowed most violators to serve only one-third of their sentences.[18] The SRA also established the United States Sentencing Commission as an independent agency within the judicial branch.[19] Congress directed the Commission to produce a sentencing system that would curtail judicial discretion. The new system would provide an imprisonment range for each crime subject to adjustments only for the crime's severity, the offender's criminal history, and relatively few extraordinary circumstances.[20]

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norm" among district judges), *reprinted in* 1984 U.S.C.C.A.N. 98 Stat. 3182, 3225–26; S. REP. NO. 98-223, at 33–62 (1983) (finding sentencing disparities "shameful"); *see also* William Wilkins, et al., *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L.F. 355, 357–64 (1991) (reviewing the history of sentencing disparity).

17. *See* S. REP. NO. 98-223, at 33–62 (1983). After reviewing extensive evidence of disparate sentencing and parole practices nationwide, the report concluded:

> The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform. Correcting our arbitrary and capricious method of sentencing will not be a panacea for all of the problems which confront the administration of criminal justice, but it will constitute a significant step forward.
>
> The bill, as reported, meets the critical challenge of sentencing reform. The bill's sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release, and make criminal sentencing fairer and more certain. The current effort constitutes an important attempt to reform the manner in which we sentence convicted offenders.

Id. at 62*; see also* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(3) (1988) (reviewing the process through which the Commission gathered information for development of the guidelines). For extensive background information about the policy and statistical considerations behind the SRA, see generally 52 Fed. Reg. 18046 (May 13, 1987); Brief for the Honorable Orrin G. Hatch, Honorable Edward M. Kennedy, and Honorable Dianne Feinstein as *amici curiae* in Support of Petitioner, United States v. Booker (U.S. 2004) (No. 04-104); United States v. Fanfan (U.S. 2004) (No. 04-105) [hereinafter Senators' *Amicus* Brief].

18. *See* S. REP. NO. 98-225 (1983), at 38, 56, *reprinted in* 1984 U.S.C.C.A.N. (98 Stat.) 3182, 3221–22, 3239; 18 U.S.C. § 3553(a)(6) (2000).

19. *Mistretta*, 488 U.S. at 368 (citing 28 U.S.C. § 991(a) (1982)).

20. *Id.* at 374–77; *see also* U.S. SENTENCING GUIDELINES MANUAL ch. 3 (1988) (providing adjustments for, *inter alia*, hate crimes, crimes against public officials, crimes in which the defendant abused a position of trust, obstruction of justice, and other extraordinary circumstances).

Based on a comprehensive review of prior federal sentencing patterns for virtually every crime in the federal code, nationwide hearings, extensive additional public comment, and numerous staff studies, the Commission promulgated sentencing guidelines that took effect in 1987.[21] The guidelines established a base offense level for most federal crimes and authorized adjustments based on specific offense characteristics (reflecting the magnitude of the crime itself and the manner in which it occurred) and the defendant's criminal history.[22] After accounting for these adjustments, the guidelines produce a final offense level containing a sentencing range within which the court ordinarily must impose sentence.[23]

Despite their statutory designation as "guidelines," the guidelines had a mandatory effect. Once a court determined the final offense level for the crime of conviction, the SRA required federal judges ordinarily to sentence within offense level's corresponding penalty range[24]—the SRA permitted judges to depart from this range only if "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission."[25]

Notwithstanding the federal guidelines' mandatory effect, it is important to distinguish them from statutes imposing mandatory minimum sentences. Mandatory minimums, which have become increasingly popular with crime control legislators,[26] represent

21. 1988 U.S. SENTENCING COMM'N ANN. REP. 1; *see also* U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A2 (1990).

> The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. . . .
>
> The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment.

Id.; *see also* U.S. SENTENCING COMM'N, SUPPLEMENTARY REP. ON THE INITIAL GUIDELINES AND POLICY STATEMENTS, ch. 2 (June 18, 1997).

22. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1–1.7.

23. *See id.* at 111–12 (providing the sentencing table used to determine the guideline range).

24. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. § 3551 (1984)).

25. 18 U.S.C. § 3553(b).

26. For example, one article notes:

> Even the guidelines weren't tough enough for many members of Congress. So on occasion over the past two decades, Congress has passed laws setting mandatory minimum sentences for specific crimes, especially those involving drugs. In those cases, judges have absolutely no discretion. The mandatory-minimum laws are

everything that sentencing guidelines are not. Rather than impose punishment after considering all of the various factors underlying the crime and the criminal, mandatory minimums impose an automatic minimum penalty based on the presence of one or two factors that the legislature deems especially pernicious (e.g., use of a weapon or distribution of a particular quantity and type of drug, such as five grams of crack cocaine).[27] In contrast, the federal guidelines individualize each sentence according to the offender's criminal history and the way in which the crime of conviction occurred.[28] The final offense level contains a sentencing range designed to reflect these complex factors rather than just one salient feature.[29]

As statutory mandatory minimums trump any conflicting sentencing guidelines, the Sentencing Commission has always structured the guidelines to conform to statutory mandatory

especially popular in election years, when legislators can use them as evidence that they are tough on crime.

Laurie P. Cohen & Gary Fields, *Legal Quagmire: High Court Ruling Unleashes Chaos over Sentencing*, WALL ST. J., July 14, 2004, at A1; *see* Brian D. Boreman, Campbell v. Georgia*: Mandatory Minimum Sentencing Survives Separation of Power Attacks, Remaining a Viable Option for the Legislature in Its War on Crime*, 17 GA. ST. U. L. REV. 637, 641 (2001) (noting the popular pressure on state legislatures to enact mandatory minimum sentencing legislation); *see also* Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87 (2003) (reviewing the recent rise in mandatory minimum sentencing in federal narcotics laws); Families Against Mandatory Minimums, *Sensenbrenner Bill Pushes for More, Tougher Federal Mandatory Minimum Sentences; Action Needed to Stop Bill from Advancing*, *at* http://www.famm.org/si_federal_sentencing_sensenbrenner_06_29_04.htm (last visited Sept. 21, 2004); Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004, H.R. 4547, 108th Cong. (2004).

27. *See* U.S. SENTENCING COMM'N, SPEC. REP. TO CONG.: MANDATORY MINIMUM PENALTIES IN THE FED. CRIMINAL JUSTICE SYSTEM 4, 28 (1991) [hereinafter MANDATORY MINIMUM PENALTIES REPORT]. As of 2003, approximately sixty percent of drug cases involved mandatory minimum sentences. LINDA D. MAXFIELD, UNITED STATES SENTENCING COMMISSION, OFFICE OF POLICY ANALYSIS, FINAL REPORT—SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES 4 (2003), *available at* http://www.ussc.gov/judsurv/jsfull.pdf [hereinafter COMMISSION 2003 SURVEY]. As Chief Justice Rehnquist observed: "One of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish." *Hearing Before the House Reform Subcomm. on Criminal Justice, Drug Policy and Human Res.*, 106th Cong. (2000) (statement of John R. Steer, Member and Vice-Chair of the U.S. Sentencing Comm.) (internal quotation marks omitted) (quoting Remarks of Chief Justice, Nat'l Symposium on Drugs and Violence in Amer., June 18, 1993) [hereinafter Statement of John R. Steer].

28. *See* MANDATORY MINIMUM PENALTIES REPORT, *supra* note 27, at 20–27.

29. *Id.*

minimum terms.[30] Thus, many of the harsh penalties contained in the guidelines represent congressional mandatory minimums rather than Commission policy.[31] Indeed the Commission has repeatedly opposed mandatory minimums and was responsible for "safety valve" legislation, which provided some relief against mandatory minimum sentencing.[32]

In contrast to statutory mandatory minimums, the federal sentencing guidelines attempt to ensure that each individualized punishment fits the underlying crime. However, at least initially after the guidelines' inception, federal judges did not see it that way. When the guidelines took effect in 1987, most federal judges criticized the new system as unduly rigid and mechanistic.[33] Their views provided fertile grounds for the first challenges to the federal guidelines' constitutionality.

II. SENTENCING WARS: THE JUDICIARY STRIKES BACK

The judiciary's initial response to *Blakely* cannot be fully understood in isolation. Although Congress established the Sentencing Commission as an independent agency within the judicial branch,[34] neither Congress nor the judiciary completely accepted the sentencing guidelines. At different times, both of these branches of government attempted to override the Sentencing Commission's authority. The judges initially reacted to their loss of control by

30. *See id.* at 29.

31. *See, e.g.*, Frank O. Bowman, *The Quality of Mercy Must Be Restrained and Other Lessons on Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 744.

32. *See* Statement of John R. Steer, *supra* note 27, at 4–6 (summarizing Commission concerns with mandatory minimums and explaining the operation of safety valves). The Commission lobbied Congress for passage of safety valve legislation providing an exception to some mandatory minimum sentences. Telephone Interview with Donald A. Purdy, former Deputy General Counsel, U.S. Sentencing Commission (Sept. 14, 2004). Among other things, the Commission submitted a draft proposal that became the basis for the law as enacted. *Id.*

33. *See, e.g.*, United States v. Tolbert, 682 F. Supp. 1517, 1524 (D. Kan. 1988) ("[T]he sentencing guidelines promulgated by the United States Sentencing Commission place rigid restrictions upon the discretion of the sentencing judge."); United States v. Elliott, 684 F. Supp. 1535, 1541 (D. Colo. 1988) (describing guidelines as "mechanistic"); United States v. Russell, 685 F. Supp. 1245, 1248–49 (N.D. Ga. 1988), *vacated and remanded by* 880 F.2d 419 (11th Cir. 1989) ("The federal sentencing guidelines . . . place rigid restrictions on the discretion of the sentencing judge. They reduce the role of the sentencing judge to filling in the blanks and applying a rigid, mechanical formula.").

34. *See* Mistretta v. United States, 488 U.S. 361, 393 (1989).

invalidating the guidelines.[35] The Supreme Court rejected these rulings,[36] but Congress increasingly attempted to assert control over sentencing policy by enacting sentencing directives for the Commission to raise penalties,[37] by enacting more mandatory minimum penalties,[38] and, ultimately, by directing the Commission to implement reforms to reduce judicial downward departures from the guidelines.[39] To the extent possible, the Commission resisted these competing pressures[40] and eventually began to win favorable responses from sentencing judges.[41] As set forth below, however, competing pressures from Congress and the judiciary created a constant state of conflict in sentencing policy. Although *Blakely* was not necessarily the product of that conflict, these ongoing tensions may account for the district courts' initial response to the *Blakely* decision.

35. *See infra* notes 42–44 and accompanying text.

36. *See infra* notes 45–48 and accompanying text.

37. Since 1994, this has become an increasingly frequent congressional practice. Chapter 2 of each *U.S. Sentencing Commission Annual Report* details specific congressional directives regarding sentencing policy. Annual reports from 1995 to present are available at http://www.ussc.gov/annrpts.htm (last visited Sept. 21, 2004).

For example, in 2001, the Commission made thirteen amendments based on congressional directives. 2001 U.S. SENTENCING COMM'N ANN. REP. 9–10. By way of comparison, all of the amendments made in the years 1992 through 1994 were based solely on Commission-initiated studies. 1992 U.S. SENTENCING COMM'N ANN. REP. 5; 1993 U.S. SENTENCING COMM'N ANN. REP. 5; 1994 U.S. SENTENCING COMM'N ANN. REP. 5. In 1995, Congress rejected two proposed Commission amendments, but did not mandate any new amendments. 1995 U.S. SENTENCING COMM'N ANN. REP. 5. In 1996, Congress directed the Commission to enact two amendments, 1996 U.S. SENTENCING COMM'N ANN. REP. 13; and in both 1997 and 1998, Congress directed the Commission to enact four amendments. 1997 U.S. SENTENCING COMM'N ANN. REP. 7; 1998 U.S. SENTENCING COMM'N ANN. REP. 8. While there were no amendments in 1999, 1999 U.S. SENTENCING COMM'N ANN. REP. 7, Congress directed the implementation of seven amendments in 2000, 2000 U.S. SENTENCING COMM'N ANN. REP. 9. Finally, in 2002, the latest year for which the annual report is available, Congress directed the Commission to make three amendments. 2002 U.S. SENTENCING COMM'N ANN. REP. 7, 10.

38. Families Against Mandatory Minimums, *History of Mandatory Sentences*, at http://famm.org/si_history_of_mandatory.htm (last visited Sept. 21, 2004).

39. *See infra* notes 60–74.

40. MANDATORY MINIMUM PENALTIES REPORT, *supra* note 27.

41. *See infra* notes 55–59 and accompanying text.

A. The Institutional Context Preceding Blakely

Soon after the guidelines took effect, defense counsel attacked them on a variety of constitutional and statutory bases.[42] Ironically (in light of *Blakely*), the argument that the guidelines' fact-finding procedures violated the Sixth Amendment right to a jury trial scarcely received attention.[43] The district courts, however, embraced these alternative challenges, as more than 200 trial judges ruled the SRA and guidelines unconstitutional in whole or in part.[44]

Before the Supreme Court, however, the guidelines easily survived constitutional scrutiny. In *Mistretta v. United States*,[45] the Supreme Court concluded (1) that the formation of the Sentencing Commission did not violate the separation of powers doctrine and (2) that Congress did not exceed its authority in delegating the task of establishing new guidelines to the Commission.[46] With only Justice Scalia dissenting, the Court issued a broad ruling sustaining the SRA. The majority found that, "although the Commission is located in the Judicial Branch, its powers are not united with the powers of the Judiciary in a way that has meaning for separation-of-

42. The main constitutional attack challenged the Sentencing Commission's constitutionality based on separation of powers and excessive delegation arguments. 1988 U.S. SENTENCING COMM'N ANN. REP. 7–8. Defense counsel also contended that the guidelines' infringement upon judicial sentencing authority violated due process. *Id.* at 9; *see* United States v. Dahlin, 701 F. Supp. 148, 148–49 (N.D. Ill. 1988) (summarizing cases); United States v. Boyd, No. 87-30025-01, 1988 U.S. Dist. LEXIS 17091, at *6–7 (D. Kan. 1988) (discussing the due process right to present evidence and separation of powers); United States v. Brown, 690 F. Supp. 1423, 1425 (E.D. Pa. 1988) (discussing due process and separation of powers); U.S. v. Landers, 690 F. Supp. 615, 618 (W.D. Tenn. 1988) (analyzing due process per interference with judicial discretion and separation of powers); United States v. Williams, 691 F. Supp. 36, 38 (M.D. Tenn. 1988) (claiming that the Commission failed to comply with the requirements of the Sentencing Reform Act); United States v. Terrill, 688 F. Supp. 542, 545–46 (W.D. Mo. 1988) (finding a violation of due process for restricting the availability of probation and improper assessment of a criminal history score); United States v. Franco, 691 F. Supp. 1036, 1037 (E.D. Ky. 1988); United States v. Rivas-Hernandez, No. CR-88-56-T, 1988 U.S. Dist. LEXIS 4840 (D. Okla. 1988).

43. Indeed, one of the few cases to consider this argument characterized it as "folly." United States v. Sheffer, 700 F. Supp. 292, 293 (D. Md. 1988) (noting also that "[t]he Sixth Amendment entitles a criminal defendant to a jury's determination of guilt and innocence, not punishment" (citation omitted)).

44. 1989 U.S. SENTENCING COMM'N ANN. REP. 11.

45. 488 U.S. 361 (1989).

46. *Id.* at 371, 374, 412.

powers analysis."[47] Based on extensive jurisprudence allowing Congress to delegate authority to federal agencies, the Court found that "Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements."[48]

After *Mistretta*, however, federal district judges accepted the guidelines grudgingly at best.[49] Judges resented the guidelines' intrusion on their traditional discretionary authority to punish defendants within a wide sentencing range. Two major developments, however, softened judicial attitudes toward the guidelines. First, the Commission made concerted efforts to work closely with the Judicial Conference to identify and remedy those guideline provisions that courts considered most problematic.[50] Second, the Supreme Court's decision in *Koon v. United States*[51] strengthened the authority of district judges, pursuant to the SRA, to depart from specified guideline ranges in unusual cases. *Koon* instructed appellate courts not to apply a *de novo* standard of review to district court departure decisions.[52] In typical cases, *Koon* gave appellate courts the power to reverse district court departures only

47. *Id.* at 393. Rather, the Court explained, "the Commission . . . is an independent agency in every relevant sense. In contrast to a court's exercising judicial power, the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines . . . ." *Id.* at 393–94.

48. *Id.* at 374. Indeed, the Court also observed that "[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate." *Id.* at 379.

49. *See* United States v. Lara, 905 F.2d 599, 609 (2d Cir. 1990) ("Many judges are unhappy with the Guidelines . . . . However, until Congress changes the law, which is its province, we must proceed within the reasonable parameters of the statute and the Guidelines."); United States v. Aguilar-Pena, 887 F.2d 347, 353 (1st Cir. 1989) ("Judicial dissatisfaction alone, no matter how steeped in real-world wisdom, cannot be enough to trigger departures, lest the entire system crumble."); *see also* Marcia Chambers, *Prosecutors Take Charge of Sentences*, NAT'L L.J., Nov. 26, 1990, at 13 (reporting that U.S. District Court Judge J. Lawrence Irving resigned over unhappiness with sentencing guidelines).

50. During the author's tenure on the Commission from 1994–98, for example, commissioners met with the Criminal Law Committee of the Judicial Conference twice annually. On several occasions, members of the Criminal Law Committee testified at Sentencing Commission hearings concerning proposed guideline amendments. *See Judicial Advisory Group Assists in Guideline Simplification Effort*, GUIDE LINES, Aug. 1996, at 3 (describing the formation of the Judicial Advisory Group, composed of one judge from each of the twelve circuits, to assist the Commission).

51. 518 U.S. 81 (1996).

52. *Id.* at 99–100.

upon finding that the district court abused its discretion.[53] This more flexible standard of review shielded more departure decisions from reversal and restored an element of judicial discretion to the sentencing process.[54]

Taken together, these developments prompted federal judges to view the guidelines more favorably. For example, a 1996 survey of federal judges found that, on average, respondents felt that guideline sentences were about "just right."[55] This trend has continued. In 2003, another survey reported that seventy-seven percent of federal judges believed that guideline sentences more often than not "provide[d] punishment levels that reflect[ed] the seriousness of the offense"[56] and sixty-two percent responded that the guidelines more often than not provided "just punishment."[57] Additionally, seventy-two percent of the respondents reported that more often than not "guideline sentences avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[58] Thus, although the survey also reported that trial

53. *Id*.

54. *See* Paul J. Hofer et al., *Departure Rates and Reasons After* Koon v. U.S., 9 FED. SENTENCING REP. 284, 284 (1997) (stating that *Koon* "appeared to be the most important development in the area of departures since implementation of the sentencing guidelines"); Abraham L. Clott, *An Assistant Public Defender Responds to* Koon, 9 FED. SENTENCING REP. 25, 25 (1996) ("Only the most plainly illegal departures should fail [under *Koon*'s abuse of discretion standard] . . . ."). However, some circuits appear to have retained a strict standard of review, even in light of the *Koon* decision. *See, e.g.*, United States v. Brennick, 134 F.3d 10 (1st Cir. 1998); United States v. Banks, 130 F.3d 621, 624 (4th Cir. 1997); United States v. Lathrop, No. 96-4904, 1997 WL 639332 (4th Cir. Oct. 17, 1997); United States v. Dethlefs, 123 F.3d 39, 43–49 (1st Cir. 1997); United States v. Barajas-Nunez, 91 F.3d 826, 831–35 (6th Cir. 1996); United States v. Weise, 89 F.3d 502 (8th Cir. 1996); *see also* Barry L. Johnson, *Discretion and the Rule of Law in Federal Guidelines Sentencing: Developing Departure Jurisprudence in the Wake of* Koon v. United States, 58 OHIO ST. L.J. 1697, 1746 n.256 (1998); Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion:* Koon*'s Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines*, 79 B.U. L. REV. 493 (1999).

55. Molly Treadway Johnson & Scott A. Gilbert, THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY 19 (1997), *cited in* Michael Goldsmith & James Gibson, *The United States Sentencing Guidelines: A Surprising Success*, XII OCCASIONAL PAPERS FROM THE CENTER FOR RESEARCH IN CRIME AND JUSTICE, NEW YORK UNIVERSITY SCHOOL OF LAW, 16–17 nn.111–12 (1998) (on file with the author).

56. Commission 2003 Survey, *supra* note 27, Appendix B, at B-1.

57. *Id*. at B-6; *see also id*. at B-11 (reporting that sixty-two percent of judges gave the guidelines average to excellent scores in evaluating their "achievements in furthering the general purposes of punishment").

58. *Id*. at B-4.

judges would still prefer more discretion,[59] as a group, they reported relatively high satisfaction with the guideline system.

Given these favorable responses, why did so many district courts so quickly conclude that *Blakely* rendered the guidelines unconstitutional? Most of these cases focused on the broad language employed in *Blakely*[60] without fully examining critical features that set apart the federal guidelines from Washington's determinate sentencing statutes. These decisions, however, may also reflect an almost institutional response to another major development in federal sentencing law: congressional enactment of the "Feeney Amendment" to the Prosecutorial Remedies and Other Tools Against the Exploitation of Children Today ("PROTECT") Act.[61]

In February 2003, the Senate unanimously passed the PROTECT Act.[62] Principally concerned with preventing kidnappings and establishing a nationwide notification system (the "Amber Alert"), this measure generated no controversy. In March 2003, however, Congressman Thomas Feeney proposed an amendment to "address[] long-standing and increasing problems of downward departures from the Federal sentencing guidelines."[63] Feeney's proposal called for restricting downward departures in all cases to criteria that had been "affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements."[64] The House of Representatives approved the Feeney Amendment 357–58 "without hearings or meaningful debate."[65]

Passage of the Feeney Amendment, however, provoked widespread criticism from the federal bench, defense attorneys, and various public interest groups.[66] This outcry prompted Congress to

59. *See id.* at B-5 (Responses to Question 9).

60. *See supra* notes 7 and 8.

61. Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended in scattered sections of 18, 28, 42, and 47 U.S.C.). The Feeney Amendment may be found at 117 Stat. 667.

62. 149 CONG. REC. S2587 (daily ed. Sept. 24, 2003).

63. 149 CONG. REC. H2422 (daily ed. Mar. 27, 2003) (statement of Rep. Feeney).

64. *Id.* at H2420.

65. United States v. Ray, 273 F. Supp. 2d 1160, 1162 (D. Mont. 2003) (quoting 149 CONG. REC. S6708-01, S6711 (daily ed. May 20, 2003) (statement of Sen. Kennedy)), *vacated*, 375 F.3d 980 (9th Cir. 2004).

66. *See, e.g.*, Mark Hamblett, *Federal Judges Attack Sentencing Restrictions: Judicial Conference Calls for Repeal of Feeney Amendment*, 230 N.Y. L.J., Sept. 24, 2003. at 1 ("The

reconsider the Act's terms. Thus, when the PROTECT Act went to conference to reconcile differences between the House and Senate versions, conferees reached a compromise that limited the most restrictive features of the Feeney Amendment to specified measures to protect children from crime.[67] Nevertheless, judges resented the Amendment's remaining restrictions, which required district courts to justify their departure decisions with a statement of reasons,[68] provided broader appellate oversight of downward departures,[69] limited composition of the Sentencing Commission to no more than three judges,[70] directed the Commission to enact new guidelines to "ensure that the incidence of downward departures are [sic]

Judicial Conference of the United States voted for a repeal of key provisions of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, saying the 'new law severely limits the ability of trial judges to depart from the Sentencing Guidelines and requires reports to Congress on any federal judge who does so.'"), *available at* http://www.law.com/jsp/article.jsp?id=1063212079768 (last visited Sept. 21, 2004).

Further, the Leadership Conference on Civil Rights, National Association for the Advancement of Colored People (NAACP), National Association of Criminal Defense Lawyers, National Legal Aid and Defender Association, National Association of Federal Defenders, and Families Against Mandatory Minimums submitted letters to Congress stating "the recently enacted PROTECT Act (S. 151) effected broad and ill-considered changes to our federal sentencing system." Letters to Senator Edward M. Kennedy and Representative John Conyers, Jr. (May 20, 2003) (encouraging the repeal of certain provisions of the PROTECT Act), *available at* http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/$FILE/JUDGES_Act_letters.pdf (last visited Sept. 21, 2004).

67. *See* H.R. Conf. Rep. No. 108-66, at 58–59 (2003); *see also* PROTECT Act, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667 (2003) (specified measures codified at 18 U.S.C. § 3553(b)(2) (2004)); United States v. VanLeer, 270 F. Supp. 2d 1318, 1323 (D. Utah 2003) (describing the limited effects of the amendment).

68. "The court . . . shall state . . . the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment . . . ." 18 U.S.C. § 3553(c)(2); *see also* United States v. Jones, 332 F.3d 1294, 1300 (10th Cir. 2003).

69. "With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts." 18 U.S.C.A. § 3742(e)(2003); *see also* United States v. Thurston, 358 F.3d 51, 70 (1st Cir. 2004) ("After the PROTECT Act, the statute requires de novo review not merely of the ultimate decision to depart, but also of 'the district court's application of the guidelines to the facts.' § 3742(e). If this court agrees that the decision to depart was justified under the guidelines, however, the extent of the departure granted by the district court is reviewed deferentially, just as it was prior to the PROTECT Act.").

70. The PROTECT Act changed the wording of 28 U.S.C. § 991(a) from "At least three" of the members shall be federal judges to "Not more than three" of the members shall be federal judges. PROTECT Act § 401(n)(1), *discussed in* United States v. Schnepper, 302 F. Supp. 2d 1170, 1183 (D. Haw. 2004). Therefore, the law no longer guarantees the federal judiciary representation on the Commission.

substantially reduced,"[71] and required the Attorney General to report to Congress whenever a sentencing judge departs downward.[72]

Notwithstanding the scaled-back version of the Feeney Amendment that became law, federal judges understandably viewed it as a frontal assault on the limited sentencing discretion they retained under the federal sentencing guidelines.[73] Some opponents characterized the reporting requirement as akin to a judicial "black list,"[74] which led at least one court to reject it "as an unwarranted interference with judicial independence and a clear violation of the separation of powers set forth in the United States Constitution."[75] Viewed in this light, *Blakey* offered federal courts a means to reassert control over sentencing decisions.[76] The *Blakely* decision admittedly contains broad language that seems to invite such rulings.

71. *Schnepper*, 302 F. Supp. 2d at 1181 (citing PROTECT Act § 401(m)(2)(A)–(B)).

72. This provision of the PROTECT Act never went into effect because a provision of the law allowed the Attorney General to avoid reporting to Congress, as required by § 401(*l*)(2), if the office of the Attorney General submitted a report to Congress detailing the "policies and procedures that the Department of Justice has adopted subsequent to the enactment of" the Feeney Amendment within ninety days of the PROTECT Act becoming law. PROTECT Act §§ 401(*l*)(1), 401(*l*)(3), *discussed in Schnepper*, 302 F. Supp. 2d at 1182. The Attorney General submitted this report to the relevant committees of Congress on July 28, 2003. *Id*.

73. *See* United States v. Green, 2004 U.S. Dist. LEXIS 11292, at *67 (D. Mass. June 18, 2004) (noting the amendment's impact on courts' sentencing discretion and observing that "the judicial response to the Feeney Amendment has been uniformly negative"); *see also* Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENTENCING RPTR. 310 (2003) (describing the "storm of protest . . . from virtually every segment of the criminal justice community" in response to the Feeney Amendment); Edward Walsh & Dan Eggen, *Ashcroft Orders Tally Of Lighter Sentences; Critics Say He Wants 'Blacklist' of Judges*, WASH. POST, Aug. 7, 2003, at A1 ("Some federal judges have spoken out forcefully against what many of them see as a congressional and Justice Department assault on their independence."); Leonard Post, *Videotaped Proceedings in Brooklyn and a Resignation in Pittsburgh*, NAT'L L.J., Feb. 9, 2004, at 4, col. 1.

74. United States v. VanLeer, 270 F. Supp. 2d 1318, 1324 (D. Utah 2003) (noting criticisms but questioning whether reporting requirement will intimidate judges).

75. United States v. Mendoza, No. 03-CR-730-ALL, 2004 WL 1191118 (C.D. Cal. Jan. 12, 2004). In reaching this conclusion, the district court characterized the legal provision in question as a "power grab by one branch of government." *Id*. at *7.

76. This view, however, certainly does not explain all decisions striking down the guidelines. For example, Judge Paul Cassell stated: "The court takes no joy in finding serious constitutional defects in the federal guidelines system. To the contrary, the court believes that the federal sentencing guidelines have insured that federal sentences achieve the purposes of just punishment and deterring future crimes." United States v. Croxford, 324 F. Supp. 2d 1230, 1253 (D. Utah 2004).

Ultimately, however, the legal basis underlying *Blakely* does not provide grounds for invalidating the federal sentencing guidelines.

B. The Basis for Blakely

Blakely concerned a defendant who pled guilty to second-degree kidnapping, a class B felony for which state law provided a maximum penalty of ten years.[77] Another statute, the Washington Sentencing Reform Act, provided a "standard range" of forty-nine to fifty-three months for class B felonies committed with a firearm (as Blakely had done).[78] This statute authorized the sentencing judge to depart upward from the penalty range only if the court found "substantial and compelling reasons justifying an exceptional sentence."[79] Pursuant to this provision and a finding of "deliberate cruelty," the judge imposed a sentence of ninety months.[80]

Based on its earlier ruling in *Apprendi v. New Jersey*,[81] the United States Supreme Court held that the judicial process that produced Blakely's sentence violated his Sixth Amendment right to a jury determination of guilt beyond a reasonable doubt because the judge, rather than the jury, determined that Blakely committed the crime with "deliberate cruelty."[82] Prior to *Apprendi*, the Supreme Court traditionally distinguished between statutory elements and mere sentencing enhancements and applied Sixth Amendment protections only to elements.[83] Although the Court had previously suggested that due process may require protections "to some degree, to 'determinations that [go] not to a defendant's guilt or innocence,

77. Blakely v. Washington, 124 S. Ct. 2531, 2535 (2004).

78. *Id*.

79. *Id*. at 2535 (citing WASH. REV. CODE ANN. § 9.94A.120(3) (2000)).

80. *Id*. at 2536.

81. 530 U.S. 466 (2000).

82. *Blakely*, 124 S. Ct. at 2538.

83. For example, as Judge Gerard Lynch has noted:

> The conventional wisdom before *Apprendi*, drawn in part from the Supreme Court's decision in *McMillan v. Pennsylvania* and in part from the law of discretionary sentencing that predated the sentencing reforms of the 1980's held that the elements of the charged offense needed to be proved to the jury beyond a reasonable doubt, but that factors that bore only on the sentence to be imposed for the offense, within the limits of the discretion confided to the courts, needed only to be proved to the satisfaction of the sentencing judge.

United States v. Emmenegger, No. 04 CR. 334 (GEL), 2004 U.S. Dist. LEXIS 15142, at *39–40 (S.D.N.Y. Aug. 4, 2004) (citations omitted); *see also* United States v. Jones, 526 U.S. 227, 232 (1999) (noting the distinction between elements and sentencing factors).

but simply to the length of his sentence,'"[84] *Apprendi* for the first time explicitly extended Sixth Amendment protections to at least some sentencing fact-findings. The *Apprendi* Court viewed sentencing enhancements that increased the defendant's penalty beyond the authorized statutory maximum sentence as "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict."[85] Accordingly, *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[86]

This holding was neither novel nor surprising, as no sentence may exceed the statutory maximum. *Blakely*, however, subsequently transformed the meaning of the term "statutory maximum." Responding to Washington State's argument that the trial court had sentenced petitioner to a term that fell short of the ten-year statutory maximum, the majority stated that "the 'statutory' maximum for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[87] Accordingly, Justice Scalia explained that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[88] As the jury's verdict alone did not authorize punishment beyond the statutory sentencing range for second degree kidnapping, Blakely's penalty violated the Constitution.[89]

In reaching this decision, the *Blakely* Court acknowledged that it had previously sustained an indeterminate sentencing scheme in which the judge, relying upon *extra-record* facts and exercising *unlimited* discretion, imposed sentence within the maximum

84. *Apprendi*, 530 U.S. at 484 (citing Almendarez-Torres v. United States, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting)).

85. *Id*. at 494 n.19.

86. *Id*. at 490.

87. *Blakely*, 124 S. Ct. at 2537.

88. *Id*. Justice Scalia explained: "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." *Id*. (citation omitted) (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872)).

89. *Id*. at 2538 ("[I]t remains the case that the jury's verdict alone does not authorize the sentence.").

established by statute.[90] Such indeterminate sentencing systems inevitably entail implicit judicial fact-finding (e.g., so the court can determine its discretionary sentence). However, Justice Scalia's majority opinion found indeterminate sentencing systems distinguishable because their fact-findings "do not pertain to whether the defendant has a legal *right* to a lesser sentence[,] and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned."[91] Thus, although indeterminate sentencing schemes expose defendants to far greater risks stemming from the broad exercise of judicial discretion, the absence of a formal fact-finding procedure apparently insulates discretionary sentencing systems from Sixth Amendment scrutiny.

Although the *Blakely* Court noted that "[t]he Federal Guidelines are not before us, and we express no opinion on them,"[92] the Court's opinion contains language potentially problematic to both the guidelines and the constitutionality of the SRA. In addition to its apparent rejection of judicial fact-finding that exposes a defendant to an increased sentence, the Court's opinion questioned the fairness of the federal system

> in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment, based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong.[93]

In response, the dissent argued that due process protects adequately against excessive enhancements when "the 'tail' of the sentencing fact might 'wa[g] the dog of the substantive offense.'"[94]

90. *Id*. ("The judge could have sentenced [the defendant] to death giving no reason at all.").

91. *Id*. at 2540. Justice Scalia also noted that "[d]eterminate judicial-factfinding schemes entail less judicial power than indeterminate schemes, but more judicial power than determinate *jury*-factfinding schemes." *Id*. at 2541.

92. *Id*. at 2538 n.9.

93. *Id*. at 2542 (citing 21 U.S.C. § 841(b)(1)(A),(D) (2000)); *see infra* note 148 and accompanying text.

94. *Id*. at 2560 (Breyer, J., dissenting) (citing McMillian v. Pennsylvania, 477 U.S. 79, 88 (1986)); *see also id*. at 2542 n.13.

The Court, however, rejected this proposal as too indefinite to provide meaningful protection.[95]

Not surprisingly, the dissenting opinions warned that *Blakely* would render the federal sentencing guidelines unconstitutional.[96] Within days of the decision, their concerns proved justified as a series of district courts declared the federal guidelines unconstitutional insofar as they required judges to make postconviction factual determinations that increase sentences.[97] Judge Paul Cassell's decision in *United States v. Croxford* is perhaps best representative of these rulings.[98]

Croxford pled guilty to one count of child exploitation in violation of 18 U.S.C. § 2251(a). Based on a number of factors, the probation officer recommended various enhancements above the base offense level. After considering the reasoning underlying *Blakely* as set forth above, Judge Cassell concluded:

> A sentence may not be enhanced when doing so requires the judge to make factual findings which go beyond the defendant's plea or the verdict of the jury. Given this rule, there is no way this court can sentence Croxford under the federal sentencing guidelines without violating his right to trial by jury as guaranteed by the Sixth Amendment.[99]

In reaching this conclusion, Judge Cassell also relied, in part, on the dissenting opinions in *Blakely* to reject the proposition that the federal sentencing guidelines are structurally or otherwise distinguishable from Washington's unconstitutional statutory sentencing scheme.[100]

95. *Id.* at 2539–40. *But see infra* notes 174–84 and accompanying text (criticizing the Court's failure to consider a proportionality-based due process analysis).

96. Indeed, Justice O'Connor warned that "[i]f the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would." *Id.* at 2550 (O'Connor, J., dissenting); *see also id.* at 2560–62 (Breyer, J., dissenting).

97. *See, e.g.*, United States v. Mueffleman, 327 F. Supp. 2d 79 (D. Mass. 2004); United States v. King, 328 F. Supp. 2d 1276 (M.D. Fla. 2004); United States v. Einstman, 325 F. Supp. 2d 373 (S.D.N.Y. 2004); United States v. Leach, 325 F. Supp. 2d 557 (E.D. Pa. 2004); United States v. Croxford, 324 F. Supp. 2d 1230 (D. Utah 2004); United States v. Medas, 323 F. Supp. 2d 436 (E.D.N.Y. 2004); United States v. Shamblin, 323 F. Supp. 2d 757 (S.D. W. Va. 2004).

98. 324 F. Supp. 2d at 1238–42.

99. *Id.* at 1238–39.

100. *Id.* at 1239.

The *Blakely* majority's broad language, together with the dissenting opinions' warning of the guidelines' imminent demise, led numerous other district judges to adopt the *Croxford* analysis.[101] At best, however, these decisions were premature. The *Blakely* Court declined to address the constitutionality of the federal guidelines.[102] Moreover, before the *Blakely* decision, every circuit had ruled that *Apprendi* did not render the federal guidelines unconstitutional.[103]

101. *See* United States v. Grant, No. 3:03-CR-339-J-99MMH, 2004 WL 1803196, at *1–2 (M.D. Fla. Aug. 12, 2004); United States v. Marrero, No. 04 CR 0086(JSR), 2004 WL 1621410, at *2 (S.D.N.Y. July 21, 2004); United States v. King, 328 F. Supp. 2d at 1276 (M.D. Fla. 2004); United States v. LaFlora, No. 03-10230-01-WEB, 2004 WL 1851533, at *2 (D. Kan. July 16, 2004); United States v. Lockett, No. CRIM. 3:04CR017, 2004 WL 1607496, at *2 (E.D. Va. July 16, 2004).

102. *Blakely*, 124 S. Ct. at 2538 n.9.

103. *See* United States v. Goodline, 326 F.3d 26, 34 (1st Cir. 2003) ("The guideline calculations are not restricted by *Apprendi*'s rule . . . ."); United States v. Luciano, 311 F.3d 146, 153 (2d Cir. 2002) ("We have repeatedly held that Guidelines ranges are not statutory maximums for the purpose of *Apprendi* analysis."); United States v. DeSumma, 272 F.3d 176, 181 (3d Cir. 2001) ("This Court has . . . concluded . . . that when the actual sentence imposed [under the Guidelines] does not exceed the statutory maximum, *Apprendi* is not implicated."); United States v. Kinter, 235 F.3d 192, 200 (4th Cir. 2000) ("We conclude, however, that the Sentencing Guidelines pass muster under the *Apprendi* Court's conception of due process . . ."); United States v. Randle, 304 F.3d 373, 378 (5th Cir. 2002) (concluding that a sentence based on facts admitted at trial supported an upward adjustment under the guidelines that did not exceed the statutory maximum); United States v. Helton, 349 F.3d 295, 299 (6th Cir. 2003) ("[O]nce the jury has determined guilt, the district court may sentence the defendant to the statutory minimum, the statutory maximum, or anything in between, based on its (proper) application of the Guidelines and based on its (permissible) preponderance-of-the-evidence findings under the Guidelines." (relying upon Harris v. United States, 536 U.S. 545 (2002))); United States v. Johnson, 335 F.3d 589, 591 (7th Cir. 2003) (per curiam) (concluding that *Apprendi* did not apply because the defendant's sentence, decided under the guidelines, was "less than the statutory maximum prescribed by the statute of conviction"); United States v. Piggie, 316 F.3d 789, 791 (8th Cir. 2003) ("The rule of *Apprendi* only applies where the non-jury factual determination increases the maximum sentence beyond the statutory range authorized by the jury's verdict." (internal quotation marks and alteration in original omitted) (quoting United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000))); United States v. Toliver, 351 F.3d 423, 433 (9th Cir. 2003) (concluding that a district judge does not violate *Apprendi* when he does not exceed the statutory maximum); United States v. Mendez-Zamora, 296 F.3d 1013, 1020 (10th Cir. 2002) ("*Apprendi* [, however,] does not apply to sentencing factors that increase a defendant's guideline range but do not increase the [sentence beyond the] statutory maximum." (internal quotations marks omitted) (alterations in original) (quoting United States v. Sullivan, 255 F.3d 1256, 1265 (10th Cir. 2001))); United States v. Sanchez, 269 F.3d 1250, 1288 (11th Cir. 2001) ("*Apprendi* has no application to, or effect on, either mandatory minimum sentences or Sentencing Guidelines calculations, when in either case the ultimate sentence imposed does not exceed the prescribed statutory maximum penalty."); United States v. Fields, 251 F.3d 1041, 1043 (D.C. Cir. 2001) ("*Apprendi* does not apply to sentencing findings that

These decisions remain in effect until either the Supreme Court or individual circuit courts, sitting *en banc*, overrule them.[104] Rather than await proper development of the issues at the appellate level, however, district courts often reached out to decide the guidelines' constitutionality—occasionally without the benefit of briefing from the parties.[105]

To the degree that district courts relied on the *Blakely* dissents to declare the guidelines unconstitutional, their analysis is misdirected: "dissenting opinions are not always a reliable guide to the meaning of the majority; often their predictions partake of Cassandra's gloom more than of her accuracy."[106] Indeed, *Blakely*'s dissenting opinions may have overlooked that the Supreme Court has previously expressed approval of judicial fact-finding—under a preponderance of the evidence standard—for sentencing enhancements under the Dangerous Special Offender law.[107] Ultimately, a series of other

elevate a defendant's sentence within the applicable statutory limits."); s*ee also Blakely*, 124 S. Ct. at 2547 n.1 (O'Connor, J., dissenting) (collecting cases).

104. *See* State Oil Co. v. Kahn, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); Agostini v. Felton, 521 U.S. 203, 207 (1997) ("The Court neither acknowledges nor holds that other courts should ever conclude that its more recent cases have, by implication, overruled an earlier precedent. Rather, lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); Gulf Power Co. v. FCC, 226 F.3d 1220, 1224 (11th Cir. 2000) ("[A] panel decision is the law of the circuit unless and until it is overruled by the Supreme Court or the en banc court."); United States v. Washington, 127 F.3d 510, 517 (6th Cir. 1997) ("In the Sixth Circuit, as well as all other federal circuits, one panel cannot overrule a prior panel's published decision."); Phillip M. Kannan, *The Precedential Force of Panel Law*, 76 MARQ. L. REV. 755, 755–56 (1993) ("[A]ll thirteen circuits, with the possible exception of the Seventh Circuit, have developed the interpanel doctrine: No panel can overrule the precedent established by any panel in the same circuit; all panels are bound by prior panel decisions in the same circuit.").

105. In *Croxford*, the district court initially issued its order without the benefit of briefing from the parties. 324 F. Supp. 2d at 1250–51 (denying motions by both the prosecution and defense for continuance to brief the constitutional issues raised by *Blakely*). Afterwards, the United States Attorney's Office submitted a "form pleading," which argued "that the Supreme Court has previously upheld the constitutionality of the Guidelines and, until the Court holds otherwise, lower federal courts are bound by those decisions and, second, that the Federal Sentencing Guidelines operate differently from the unconstitutional guidelines used in Washington State that were at issue in *Blakely*." *Id.* at 1257. Judge Cassell rejected this filing as unpersuasive. *Id.*

106. United States v. Penaranda, 375 F.3d 238, 245 (2d Cir. 2004) (quoting Local 1545 v. Vincent, 286 F.2d 127, 132 (2d Cir. 1960)).

107. In McMillan v. Pennsylvania, the Supreme Court stated:

> Sentencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime without suggesting that

Supreme Court decisions sustaining the federal sentencing guidelines provides a more reliable guide to their constitutionality.

III. THE CONSTITUTIONAL CONTEXT: THE SUPREME COURT AND FEDERAL SENTENCING GUIDELINES

Courts rejecting the guidelines have largely ignored other Supreme Court precedent, failed to fully consider important differences between the federal sentencing guidelines and the state sentencing statutes that *Blakely* found objectionable, and taken an unduly expansive interpretation of *Blakely*. For example, the *Croxford* court declined to impose an obstruction of justice enhancement upon the defendant, noting that the majority in *Blakely* apparently found that precise enhancement objectionable.[108] Whatever the differences between the *Blakely* majority and dissents on this point, however, the Supreme Court did not overrule its unanimous decision in *United States v. Dunnigan*,[109] which

> those facts must be proved beyond a reasonable doubt. *The Courts of Appeals have uniformly rejected due process challenges to the preponderance standard under the federal "dangerous special offender" statute, 18 U.S.C. § 3575, which provides for an enhanced sentence if the court concludes that the defendant is both "dangerous" and a "special offender."*

477 U.S. 79, 92 (1986) (emphasis added) (citation omitted) (citing United States v. Davis, 710 F.2d 104, 106 (3d Cir. 1983) (collecting cases)).

Although the *Blakely* Court limited *McMillan* to statutes that increase mandatory minimums, 124 S. Ct. at 2538, the now-repealed dangerous special offender law increased the statutory maximum and did not involve mandatory minimums. 18 U.S.C. § 3575 (repealed 1984). Indeed, subject to a constraint against "disproportionate" penalties, the law authorized judges to enhance sentences as much as twenty-five years *beyond the statutory maximum*. 84 Stat. 948, 949 (codified at 18 U.S.C. § 3557(b)) (repealed 1984) (emphasis added). The Judicial Conference of the United States endorsed this legislation. *See* H.R. Rep. No. 91-1549 *reprinted in* 1970 U.S.C.C.A.N. 4007, 4051. To enhance a sentence, the dangerous special offender law required the trial judge to make certain factual findings comparable to those required under the federal sentencing guidelines. For example, the law required a finding that the defendant committed a designated felony

> as part of a pattern of conduct . . . which constituted a substantial source of his income, and in which he manifested special skill or expertise; or . . . [was] a conspiracy with three or more other persons to engage in a pattern of [criminal] conduct . . . and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy.

18 U.S.C. § 3575(e)(2–3) (repealed 1984).

108. *Croxford*, 324 F. Supp. 2d at 1240 n.49, *aff'd*, 324 F. Supp. 2d 1255 (D. Utah 2004).

109. 507 U.S. 87 (1993).

instructed sentencing judges to decide the facts pertinent to the obstruction of justice guideline enhancement.[110]

A. District Courts Have Ignored Controlling Supreme Court Precedent

For the most part, district courts invalidating the guidelines have failed to address the substantial body of Supreme Court precedent sustaining the constitutionality of the federal guidelines since their inception.[111] Starting with *Mistretta v. United States* in 1989, the Supreme Court upheld the guidelines' constitutionality in the face of a broad challenge on separation of powers grounds. [112] Although *Mistretta* did not involve a Sixth Amendment challenge to the guidelines, the Court's opinion carefully reviewed the origin and operation of the newly established guideline system, which, by its nature, required judicial fact-finding.[113]

Further, on two occasions the Supreme Court has broadly endorsed the guidelines' relevant conduct rules, which potentially enhance sentences based on conduct beyond the actual count of conviction.[114] These rules implement the Commission's "modified real offense" sentencing system, which increases penalties based on certain real offense conduct underlying the offense of conviction.[115]

110. *Id.* at 95 ("[I]f a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish . . . obstruction of justice . . . .").

111. *See supra* note 7 (collecting cases); *see also*, *e.g.*, Croxford v. United States, 324 F. Supp. 2d 1230 (D. Utah 2004). However, in his subsequent opinion, in which he responded to briefing by the United States, *see supra* note 105, Judge Cassell did address *Edwards v. United States*, 523 U.S. 511, 512–13 (1998), *United States v. Watts*, 519 U.S. 148, 164 (1997), *Witte v. United States*, 515 U.S. 389, 411 (1995), *Stinson v. United States*, 508 U.S. 36 (1993), and *Mistretta v. United States*, 488 U.S. 361, 363 (1989). Croxford v. United States, 324 F. Supp. 2d 1255, 1258–61 (D. Utah 2004).

112. 488 U.S. at 412.

113. *Id.* at 378–79 (noting that the Commission has relied on "the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy" properly to exercise judgment in establishing the sentencing guidelines (internal quotation marks omitted) (quoting Yakus v. United States, 321 U.S. 414, 425 (1944))).

114. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2003).

115. Julie R. O'Sullivan, Symposium: *The Federal Sentencing Guidelines: Ten Years Later: In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1348 (1997). The Commission implemented its "modified, real offense sentencing" approach as a compromise between purely charge based and real offense based options. *See* 51 Fed. Reg. 35,086 (Oct. 1, 1986); William W. Wilkins & John R. Steer, *Relevant Conduct: The*

The relevant conduct rules, however, are constrained by the authorized statutory maximum set by Congress for the offense,[116] the elements of which are always found by the jury in its verdict. Thus, in *Witte v. United States*, the Supreme Court used the statute, rather than the guidelines, to identify the maximum penalty range for the offense.[117] *Witte* involved a claim that the Double Jeopardy Clause precluded prosecuting a defendant for conduct (trafficking 1091 kilograms of cocaine) that had been the subject of a prior conviction's relevant conduct enhancement.[118] In rejecting this argument, the Court observed that the relevant conduct rules produced an increased guideline range that "still falls within the scope of the *legislatively* authorized penalty (5 to 40 years)."[119]

The *Witte* Court also noted that "[t]he relevant conduct provisions of the Sentencing Guidelines . . . are sentencing enhancement[s] . . . evincing the judgment that a particular offense should receive a more serious sentence *within the authorized range* if it was either accompanied by or preceded by additional criminal activity."[120] Put simply, the enhancement applies because the "offense was carried out in a manner that warrants increased punishment."[121] Accordingly, the Court held that "where *the legislature* has authorized . . . a particular punishment range for a given crime, the resulting sentence *within that range* constitutes

Cornerstone of the Federal Sentencing Guidelines, 41 S.C. L. Rev. 495, 497–99 (1990); O' Sullivan, *supra*, at 1349, 1352–61. Under this system, the offender is held accountable—and incurs an increased sentence—for designated harms that occurred either in connection with the offense of conviction or, in some instances, "that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a) (2003). Under no circumstances, however, may the sentence exceed the statutory maximum set by Congress when it defined the offense. U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(1) (2003). *See infra* note 156 and accompanying text. Of course, the elements of the offense are always decided by the jury.

116. 28 U.S.C. § 994(a) (explaining that guidelines must be consistent with federal statutes); U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(1) (2003).

117. 515 U.S. 389, 399 (1995); U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(1) (2003).

118. *Witte*, 515 U.S. at 391.

119. *Id*. at 399 (emphasis added). The Court stated that "the uncharged criminal conduct was used to enhance petitioner's sentence within the range *authorized by statute*." *Id*. (emphasis added).

120. *Id*. at 403 (emphasis added).

121. *Id*.

punishment only for the offense of conviction for purposes of the double jeopardy inquiry."[122]

In *United States v. Watts*, the Court even endorsed a guideline sentencing enhancement for relevant *acquitted* conduct.[123] After the jury convicted defendant on drug charges and acquitted him on a firearms count, the trial judge "found by a preponderance of the evidence that Watts had possessed the guns in connection with the drug offense."[124] On appeal, the Supreme Court did not even permit briefing or full argument, and its per curiam opinion characterized as "novel"[125] the view that a sentencing judge may not consider conduct encompassed by the jury's acquittal. The Court observed that "longstanding" statutory and common law doctrine authorized a sentencing judge to consider a wide variety of information about the defendant,[126] which "traditionally and constitutionally"[127] may include acquitted conduct.[128] The *Watts* Court concluded:

> For these reasons, "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." The Guidelines state that it is "appropriate" that facts relevant to sentencing be proved by a preponderance of the evidence and we have held that application of the preponderance standard at sentencing generally satisfies due process.[129]

Adding his support for a procedure that necessarily involves judicial fact-finding, Justice Scalia concurred separately in *Watts* to

122. *Id.* at 403–04 (emphasis added).

123. 519 U.S. 148, 157 (1997).

124. *Id.* at 150; *see also id.* at 170–71 (Kennedy, J., dissenting) (electing to dissent because the Court had not allowed full briefing or consideration on the oral argument calendar).

125. *Id.* at 154.

126. *Id.* at 151.

127. *Id.* at 152 (citing Nichols v. United States, 511 U.S. 738, 747 (1994)).

128. *Id.* (citing United States v. Donelson, 695 F.2d 583, 590 (D.C. Cir. 1982)).

129. *Id.* at 156 (emphasis added) (citations omitted) (quoting Dowling v. United States, 493 U.S. 342, 349 (1990); U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. (2003)) (citing McMillan v. Pennsylvania, 477 U.S. 79, 91–92 (1986), *aff'd*, 376 Pa. Super. 25 (1988); *Nichols*, 511 U.S. at 747–48). The Court "acknowledge[d] a divergence of opinion" concerning "whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence," but did not consider the situation before it to "present such exceptional circumstances." *Watts*, 519 U.S. at 156–57; *see also McMillan*, 477 U.S. at 92 n.8 (1986) ("[S]entencing courts have always operated without constitutionally imposed burdens of proof . . . .").

emphasize his view that the Sentencing Commission could not reverse the Court's decision "by mandating disregard of the information we today hold it proper to consider."[130] Thus, both *Witte* and *Watts* contemplated judges routinely conducting postconviction fact-finding in determining whether to apply sentencing enhancements within statutory limits set by Congress for the offense, the elements of which are always submitted to the jury for a determination of guilt consistent with all constitutional rights.

Witte and *Watts* do not stand alone. On other occasions, the Supreme Court has reiterated its "traditional understanding of the sentencing process [as one] which we have often recognized as less exacting than the process of establishing guilt."[131] Thus, a series of Supreme Court decisions principally warns against sentences that exceed statutory limits—guideline increases within such limits have never warranted constitutional attention.

For example, in *Edwards v. United States*, defendants challenged the trial judge's authority to determine the type and quantity of drugs underlying a jury's general guilty verdict. [132] On appeal, the defense argued that, given the general verdict, the sentencing judge "must assume that the conspiracy involved only cocaine, which . . . the Sentencing Guidelines treat more leniently than crack."[133] Among other points, defendants' briefs argued that holding them accountable for crack cocaine would violate their Sixth Amendment right to a jury determination.[134]

130. *Watts*, 519 U.S. at 158. Justice Scalia explained that the Sentencing Reform Act requires the Guidelines to be "consistent with all pertinent provisions of title 18, United States Code." [28 U.S.C. § 994(b)(1).] In turn, 18 U.S.C. § 3661 provides that "[n]o limitation shall be placed on the information concerning the background, character, and *conduct* of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

Id. (emphasis added) (second alteration in original).

131. *Nichols*, 511 U.S. at 747.

132. 523 U.S. 511, 513 (1998). The jury instructions at issue allowed the jury to convict on finding a conspiracy to distribute either cocaine or crack, but the judge imposed sentence as if both drugs were involved. The defendants challenged the sentence because the jury could have intended to find only cocaine. *Id.*

133. *Id*.

134. *See* Brief for Petitioners at 7–8, Edwards v. United States, 523 U.S. 511 (1998) (No. 96-8732).

In rejecting this argument, the Court apparently endorsed both the guidelines' relevant conduct rules[135] and the sentencing judge's authority to decide the facts pertinent to punishment within the maximum statutory range. The Court in *Edwards* observed, "[o]f course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue . . . that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy."[136] Significantly, the *Apprendi* Court later quoted this language in noting that "[t]he Guidelines are . . . not before the Court. We therefore express no view on the subject beyond what this Court has already held."[137] Thus, *Apprendi* seemed to indicate the Court's view that *Edwards* had addressed the Sixth Amendment guidelines issue.

Subsequently, *Harris v. United States* sustained a trial judge's postconviction authority to find facts triggering application of a statutory mandatory minimum sentence.[138] The Court reasoned that, in contrast to penalties that raise statutory maximums,[139] "[j]udicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury trial, and 'reasonable doubt' components of the Fifth and Sixth Amendments."[140] At the very least, this post-*Apprendi* language suggests that the application of *Blakely* to the federal sentencing

135. *See Edwards*, 523 U.S. at 514 ("[R]elevant conduct' . . . includes *both* conduct that constitutes the 'offense of conviction,' *and* conduct that is 'part of the same course of conduct or common scheme or plan as the offense of conviction." (internal quotation marks and citations omitted) (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1–2) (1998))).

136. *Id*. at 515.

137. Apprendi v. New Jersey, 530 U.S. 466, 497 n.21 (2000) (emphasis added) (citing *Edwards*, 523 U.S. at 515); *see also* United States v. Emmenegger, No. 04 CR. 334 (GEL), 2004 U.S. Dist. LEXIS 15142, at *35–36 (S.D.N.Y. Aug. 4, 2004) ("[A]lthough the Court has never addressed, with specific reference to the Guidelines, the precise jury trial right implicated by *Blakely* and *Apprendi*, it has, without a murmur of constitutional qualm, previously affirmed sentences that would appear to present the very concerns that some now argue invalidate the Guidelines.").

138. 536 U.S. 545, 568–69 (2002).

139. The Court stated: "[A mandatory minimum] neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; *it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding* . . . ." *Id*. at 559 (emphasis added) (internal quotation marks omitted) (quoting McMillan v. Pennsylvania, 477 U.S. 79, 87–88 (1986)). Of course, sentencing guidelines place similar limits on the sentencing court's discretion.

140. *Id*. at 558 (emphasis added).

guidelines is hardly a foregone conclusion—especially since *Harris* also observed: "'It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution.'"[141]

B. The Differences Between the Washington and the Federal Sentencing Guidelines

The above decisions demonstrate that the Supreme Court has always permitted judicial fact-finding for sentencing offenders within the statutory maximum.[142] The decisions also show that, rather than look to the jury's verdict in each particular case, the Court has routinely used the term "statutory maximum" with reference to the heaviest potential *legislative* sanction.[143] To the degree that *Blakely* suggests otherwise, it is an aberration that can be best reconciled by recognizing important differences between the Washington statutes and federal sentencing guidelines.

1. An overarching federal system

Unlike Washington's sentencing scheme, which created "dueling" *statutory* maximum penalties,[144] the federal sentencing

141. *Id*. (emphasis added) (quoting Jones v. United States, 526 U.S. 227, 248 (1999)). The Court further emphasized that the statute at issue "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and *dictated the precise weight to be given that factor*." *Id*. at 559 (emphasis added) (omission in original) (internal quotation marks omitted) (quoting *McMillan*, 477 U.S. at 89–90).

142. Thus, prior to *Blakely*, every circuit court ruled that *Apprendi* did not render the federal sentencing guidelines unconstitutional because the guidelines operated within the statutory maximum. *See supra* note 103.

143. For example, the *Harris* Court observed:

> Since sentencing ranges came into use, defendants have not been able to predict from the face of the indictment precisely what their sentence will be; the charged facts have simply made them aware of the "heaviest punishment" they face if convicted. Judges, in turn, have always considered uncharged "aggravating circumstances" that, while increasing the defendant's punishment, have not "swell[ed] the penalty above what the law has provided for the acts charged."

Harris, 536 U.S. at 562 (alteration in original) (citations omitted) (quoting 1 BISHOP, *supra* note 88, § 81, at 54); *see also* United States v. Cotton, 535 U.S. 625, 632 (2002) (setting aside a post-conviction judicial determination and noting that "the indictment's failure to allege a fact, drug quantity, that increased the statutory maximum sentence rendered respondents' enhanced sentences erroneous under the reasoning of *Apprendi* and *Jones*").

144. *See* United States v. Gonzales Magana, No. 98-10487, 2004 U.S. App. LEXIS 15759, at *3 (9th Cir. July 29, 2004); Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16

guidelines operate as judicial rules within an overarching statutory structure of substantive criminal law.[145] In contrast to Washington criminal law (e.g., kidnapping), the federal sentencing guidelines do not establish degrees of culpability that trigger corresponding increases in any statutory maximum. Indeed, the federal sentencing guidelines are nonsubstantive in that they neither define criminality nor "bind or regulate the primary conduct of the public."[146] Under traditional Supreme Court analysis, this omission means the guidelines do not constitute elements of criminality.[147] Moreover the Supreme Court has previously stated that the guidelines do not "vest in the Judicial Branch [through the Commission] the legislative responsibility for establishing minimum and *maximum* penalties for every crime."[148] In cases of conflict between the federal guidelines and the substantive criminal law, statutory text trumps the guidelines.[149] Thus, the Supreme Court has observed that, rather than create new *statutory* ranges, the guidelines "do no more than fetter the discretion of sentencing judges to do what they have done

FED. SENTENCING REP. (forthcoming), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/kingklein_beyond_blakely.pdf (last visited Sept. 21, 2004) [hereinafter *Beyond* Blakely].

145. Mistretta v. United States, 488 U.S. 366, 391 (1989) ("[G]uidelines . . . are court rules . . . for carrying into execution judgments that the Judiciary has the power to pronounce."); *see also* Stinson v. United States, 508 U.S. 36, 45 (1993) ("[T]he guidelines are the equivalent of legislative rules adopted by federal agencies.").

146. *Mistretta*, 488 U.S. at 396; *see* United States v. Kinter, 235 F.3d 192, 201 (4th Cir. 2000) ("The Sentencing Guidelines do not create crimes. They merely guide the discretion of district courts in determining sentences within a legislatively-determined range, and this discretion has been entrusted to the federal courts '[f]rom the beginning of the Republic.'" (alteration in original) (quoting Apprendi v. New Jersey, 530 U.S. 466, 480 n.9 (2000) (internal quotation marks omitted) (quoting KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9 (1998)))).

147. *See, e.g.*, Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998) (noting parenthetically that the "definition of a criminal offense [is] entrusted to the legislature, 'particularly in the case of federal crimes, which are solely creatures of statute'" (quoting Staples v. United States, 511 U.S. 600, 604 (1994) (internal quotation marks omitted) (quoting Liparota v. United States, 471 U.S. 419, 424 (1985)))). *Almendarez-Torres v. United States* also rejected the proposition "that the Constitution requires that most, if not all, sentencing factors be treated as elements. But *Patterson* suggests the exact opposite, namely, that the Constitution requires scarcely any sentencing factors to be treated in that way." *Id.* at 241.

148. *Mistretta*, 488 U.S. at 396 (emphasis added).

149. *See* Apprendi v. New Jersey, 530 U.S. 466, 497 n.21 (2000); Edwards v. United States, 523 U.S. 511, 515 (1998); *supra* notes 32, 146, and accompanying text.

for generations—impose sentences within the broad limits established by Congress."[150]

2. Base offense levels, not standard sentencing ranges

Further, in contrast to Washington's statutes, the federal guidelines do not establish a "standard sentencing range" for each crime.[151] While each crime carries a corresponding *base* offense level that contains its own sentencing range, that base offense level is only a starting point and is subject to adjustment for aggravating or mitigating specific offense characteristics.[152] Because the guidelines contemplate building upon this base offense level to reflect the true nature and impact of the offender's criminal conduct,[153] there is no legal or logical basis for treating the base offense level as the statutory maximum.

For example, the guidelines set the base offense level for a first-time fraud conviction at seven, with a corresponding range of zero to six months imprisonment.[154] Given this penalty structure, Judge Gerard Lynch has observed:

> Within the context of the Guidelines, however, it makes little sense to say that Congress intended the "statutory maximum" sentence

150. *Mistretta*, 488 U.S. at 396.

151. In fact, Congress intended that there be "numerous guideline ranges, each range describing a somewhat different combination of offender characteristics and office circumstances. There would be expected to be, for example, several guideline ranges for a single offense varying on the basis of aggravating and mitigating circumstances." S. REP. NO. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3351. Therefore, Congress directed the Commission to develop sentencing ranges applicable for specific categories of offenses involving similarly situated defendants, rather than for sentencing ranges for each particular crime. *See* 28 U.S.C. § 994(b)(1) (2000); U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2003); 3 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 526.1 (Crim. 3d 2004).

152. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2003); United States v. Finch, 282 F.3d 364, 367 (6th Cir. 2002) ("[The] base offense level is the starting point in the sentencing computation.").

153. *See supra* notes 22–24 and accompanying text; *cf.* United States v. Koch, No. 02-6278, U.S. App. 2004 WL 1899930, at *6 (6th Cir. Aug. 26, 2004) ("The Guidelines do not supply a clear 'standard sentencing range' for each defendant and indeed represent a form of indeterminate-determinate sentencing because even after application of the hundreds of pages of the Guidelines Manual, to say nothing of relevant case law, to each individual defendant's sentence, judges still may increase (or decrease) sentences based on factors not addressed in the Guidelines.").

154. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a)(1) (2003); U.S. SENTENCING GUIDELINES MANUAL app. G (2003) (sentencing table); *Beyond* Blakely, *supra* note 144.

> for the crime of wire fraud to be six months rather than the twenty years to which Congress, subsequent to the adoption of the Sentencing Reform Act [,]. . . increased the actual statutory maximum sentence for that crime.[155]

This is especially true in light of the guidelines' "modified real offense" approach to sentencing, which—subject to the statutory maximum—increases penalties based on the defendant's relevant conduct to the crime of conviction.[156] Thus, contrary to Justice Scalia's argument in *Blakely*, there is no "right" to be sentenced at the guidelines' base offense level.[157]

3. An individualized, rather than presumptive, approach

The guidelines' individualized approach to sentencing also sets it apart from the Washington sentencing system, which provided a generic sentencing range based primarily on the elements of the offense of conviction. For example, as Judge Gerard Lynch astutely explains:

> Unlike most state penal codes, which frequently divide crimes into narrow degrees and standard categories often patterned on the highly rationalistic Model Penal Code, federal criminal statutes typically cover a vast range of behavior in undifferentiated, very general formulations. The wire fraud statute is a classic example of such a statute, which quite literally covers a multitude of sins of quite different kinds and degrees. Unlike many state guideline systems, the federal Guidelines do not set a "standard sentencing range" for the crime of wire fraud, or for most other crimes of conviction. Rather, the Guidelines provide a methodology for assessing the seriousness of different instances of crime, quite

155. United States v. Emmenegger, No. 04 CR. 334 (GEL), 2004 U.S. Dist. LEXIS 15142, at *50–51 (S.D.N.Y. Aug. 4, 2004). Similarly, Judge McMahon has observed:

> [I]t seems evident in this day and age of Enron and Sarbanes-Oxley that Congress would never have countenanced a Guidelines system in which all first-time offenders . . . were limited to a sentence of 0–6 months—the base offense for all fraud convictions—without regard to the amount of the fraud, its sophistication, or the role played by the defendant in the conspiracy. Such sentences make a mockery of the real (not "relevant") statutory maxima that have been set by the Legislative Branch, and effectively eviscerate Congress's expressed intention . . . .

United States v. Einstman, 325 F. Supp. 2d 373, 380 (S.D.N.Y. 2004) (finding the guidelines unconstitutional but declining to hold them severable).

156. *See supra* notes 114–16 and accompanying text.

157. *See supra* note 91 and accompanying text.

> separate from the elements of any particular statutory crime. Where it may make sense to think of the 49–53 month "standard sentencing range" as the operative ordinary maximum punishment for kidnapping in the second degree in Washington, the federal Guidelines defy any effort to identify a "standard sentencing range" (or a "statutory maximum" other than the one literally provided by *18 U.S.C. § 1343*) for wire fraud. The system simply does not work that way.[158]

In *Blakely*, the sentencing judge departed upward from this range based upon finding an aggravating factor that distinguished second-degree from first-degree kidnapping.[159] Consequently, although Blakely pleaded guilty to second degree kidnapping, the trial court sentenced him almost as severely as if he had been convicted of first degree kidnapping.[160] This is also comparable to the circumstances in *Apprendi,* in which the defendant pleaded guilty to a firearms violation carrying a maximum penalty of ten years imprisonment but was sentenced pursuant to an aggravated hate crime statute with a twenty-year maximum term.[161] The federal sentencing guidelines do not permit this result, as the crime of conviction always sets the maximum sentence.[162] This explains why, before *Blakely*, every circuit ruled that *Apprendi* did not render the federal sentencing guidelines unconstitutional.[163]

Nor, as Justice Scalia's majority opinion stated in *Blakely*, do the federal guidelines create a regime

> in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment . . . based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation

158. *Emmenegger*, 2004 U.S. Dist. LEXIS 15142, at *51–52.

159. 124 S. Ct. at 2539.

160. The judge in Blakely's case imposed a sentence of ninety months, only eight months short of a sentence for first-degree kidnapping. *See id*. at 2535.

161. *See* 530 U.S. at 468–69; *see also* United States v. Pineiro, 377 F.3d 464, 473 n.7 (5th Cir. 2004) (noting parenthetically that in *Apprendi* "the effect of the hate-crime enhancement was to 'turn a second-degree offense into a first-degree offense'" (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 (2000))).

162. Edwards v. United States, 523 U.S. 511, 515 (1998) ("[A] maximum sentence set by statute trumps a higher sentence set forth in the [Federal Sentencing] Guidelines."); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(a) (2003).

163. *See supra* note 103.

> officer who the judge thinks more likely got it right than got it wrong.[164]

To the degree that this practice ever occurred, it originated from federal statutes rather than the federal guidelines, which merely implemented them.[165] More importantly, the *Blakely* majority's preceding reference to the federal sentencing practice is mistaken. Since the Court's decision in *Apprendi,* federal courts have required prosecutors to allege and prove facts (such as drug type and quantity) that expose a defendant to higher *statutory* maximums.[166] The federal sentencing guidelines, which operate within these statutory maximums, therefore are irrelevant to the *Blakely* Court's concern.[167]

Thus, neither prior Supreme Court jurisprudence nor the concerns that gave rise to *Blakely* support the proposition that the Sixth Amendment requires a jury finding whenever a specific offense characteristic adjusts the guidelines' offense level to produce an increased sentencing range within the statutory maximum.

C. Extending Blakely *Would Run Counter to History and Common Sense*

Extending *Blakely* to require jury verdicts for guideline enhancements within statutory maximums also runs counter to history and common sense. Historically, eighteenth century juries

164. *Blakely*, 124 S. Ct. at 2542 (citation omitted); *see also supra* note 93.

165. Justice Scalia cites 21 U.S.C. § 841, which sets forth the criminal penalties for narcotics violations. This statute imposes increasingly lengthy sentences depending on drug quantity. As Justice Scalia points out, quantity was often found by the judge post-trial. *See, e.g.*, United States v. Chester, No. 91-3059, 1992 WL 63337 (D.C. Cir. Mar. 27, 1992) ("We have found that 'the quantity of drug possessed is not a constituent element of the offense of possession with intent to distribute under 21 U.S.C. § 841(a). Quantity is relevant only to punishment; the district judge, and not the jury, makes this determination.'" (quoting United States v. Patrick, No. 90-3178, slip op. at 6 n.5 (D.C. Cir. Mar. 17, 1992) (citing cases))).

166. *See, e.g.*, United States v. Nance, 236 F.3d 820, 824 (7th Cir. 2000) (collecting cases). Of course, if Justice Scalia's principal concern was with the guidelines' relevant conduct rules, the Supreme Court has already endorsed them, and Justice Scalia issued a separate concurring opinion to emphasize that the Commission lacked discretion to disregard the "character and conduct" of a convicted person. *See supra* notes 120–30 and accompanying text; *see also infra* note 167.

167. Moreover, to the degree that the guidelines specific offense characteristics might produce dramatic sentence increases, courts routinely inform defendants of this possibility at the change of plea colloquy. *See* FEDERAL JUDICIAL CENTER, BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 71–73 (4th ed. 2000).

had little or no occasion to consider sentencing factors because criminal violations carried fixed penalties based upon the severity (or degree) of the statutory offense.[168] When nineteenth-century legislatures adopted indeterminate sentencing schemes, judges operated with vast discretion to impose any sentence within the maximum penalty set by law.[169] Further, if judges chose to conduct a sentencing hearing, they could consider factors outside the realm of evidentiary rules and without burden of proof constraints.[170] Indeed, the sentencing court did not have to issue formal findings of fact or otherwise explain its sentencing decision.[171]

Of course, unfettered discretion produced widespread disparities, which, in turn, prompted Congress to enact the SRA.[172] Requiring jury verdicts to justify each sentencing enhancement would further

168. *See* ALAN DERSHOWITZ, FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING 83 (1976) ("punishments were legislatively prescribed with some precision"); Ilene Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 892 (1990) ("Each crime had a defined punishment; the period of incarceration was generally prescribed with specificity by the legislature."). Indeed, Virginia "was the first state to formally adopt jury sentencing for all criminal offenses," and this did not occur until 1796. Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 317 (2003). Although some scholars take a different view of colonial sentencing statutes, they agree that the jury did not play a significant role in sentencing determinations. Professors King and Klein have observed:

> As an initial matter, it is doubtful that the setting of penalties was ever as firmly a part of the jury's function in the United States as it was in England. Compared to jurors on the other side of the Atlantic, *American[s]. . . at the time of the adoption of the Bill of Rights played a minor role in sentencing.* Instead, many—or perhaps most—sentences were set by judges, at their discretion, within broad statutory ranges.

Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1506 (2001) (emphasis added); *see also* Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 937, 937 (2003). *But see* STITH & CABRANES, *supra* note 146, at 9–10 (distinguishing between state and federal courts—juries had sentencing responsibility in the former but not the latter).

169. Senators' *Amicus* Brief, *supra* note 17, at 4.

> During the 19th century and most of the 20th century, federal sentencing was generally conducted pursuant to an intermediate system. For most offenses, Congress proscribed a range of punishment that could be imposed for an individual convicted of a particular offense, but judges were free to impose a sentence anywhere within that statutory range based on the consideration of virtually any information that a court deemed relevant . . . .

Id.

170. *See id*. at 4–6; *see also, e.g*., Mistretta v. United States, 488 U.S. 361, 363 (1989).

171. *Mistretta*, 488 U.S. at 363.

172. *See* S. REP. NO. 98-223, *supra* note 17 and accompanying text.

reduce judicial discretion under the federal guidelines. Consider an offender, utterly without remorse, who states his intent to remain in contact with gang members and to "have nothing to do with the laws of society." Suppose further that the probation office delivers a devastating victim impact statement to the judge. The district court might properly consider such circumstances sufficiently egregious to warrant an upward departure from the applicable guideline range, and should retain authority to impose punishment accordingly.[173] Decisions of this kind are usually not suitable for jury determinations; this information is rarely available prior to conviction, and in any event, jurors lack the judge's experience in evaluating how this offender's uniquely negative qualities compare with other more ordinary or conciliatory violators.[174]

Of course, the practical need to allow judges authority to increase penalties (within the statutory maximum) is not without limits. And contrary to Justice Scalia's opinion in *Blakely*,[175] judges are well equipped to prevent the guidelines from becoming "'a tail which wags the dog of the substantive offense.'"[176] Justice Scalia considered the dissent's canine reference too vague for meaningful

173. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0–2.9 (2003) (listing appropriate grounds for upward departures); *see also* United States v. Simmons, 368 F.3d 1335, 1340 (11th Cir. 2004) ("While the Guidelines address several of the most common characteristics of offenses and defendants, there is an almost endless variety of other circumstances or considerations that might warrant upward departures." (citing and quoting parenthetically U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(b) (2001) ("[I]t is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision."))).

Courts use their discretion in imposing upward departures where appropriate. *See, e.g.*, United States v. Courtney, 362 F.3d 497, 503–04 (8th Cir. 2004) (infliction of extreme psychological harm to the defendant's victims, as shown in victim-impact statements (citing U.S. SENTENCING GUIDELINES MANUAL § 2N1.1, cmt.1)); United States v. Melgar-Galvez, 161 F.3d 1122, 1124 (7th Cir. 1998) ("[T]he defendant has continually demonstrated a propensity to violate the laws of this country [and] reveals a clear and uncompromising recidivist type of criminal nature which we agree certainly should be subject to upward departure."); United States v. Damico, 99 F.3d 1431, 1439 (7th Cir. 1996) (involvement with organized crime); United States v. Akindele, 84 F.3d 948, 952–53 (7th Cir. 1996) (degree of victim harm); United States v. Lara-Banda, 972 F.2d 958, 960 (8th Cir. 1992) (defendant was unrepentant, incorrigible, and posed a risk to the community).

174. *Cf.* Koon v. United States, 518 U.S. 81, 98 (1996) (noting that the district court is "informed by its vantage point and day-to-day experience in criminal sentencing" and has "an institutional advantage . . . in making these sorts of determinations").

175. 124 S. Ct. at 2542 n.13.

176. United States v. Watts, 519 U.S. 148, 156–57 n.2 (1997) (quoting *McMillan*, 477 U.S. at 88); *see Blakely*, 124 S. Ct. at 2560 (Breyer, J., dissenting).

due process analysis.[177] But this metaphor, which the Supreme Court has previously employed,[178] simply expresses the principle that due process does not permit sentencing factors to produce penalties grossly disproportionate to the crime of conviction. Justice Scalia's majority opinion seems to demand a definitive rule where a less exacting standard should suffice. Judges routinely apply standards, rather than rules, in resolving constitutional questions.[179] In particular, American courts have applied the proportionality principle to a wide range of situations, including Eighth Amendment claims of cruel and unusual punishment,[180] excessive fines,[181] and the propriety

177. *Blakely*, 124 S. Ct. at 2542 n.13.

178. *See, e.g.*, *Watts*, 519 U.S. at 156–57 n.2 (citations omitted); *McMillan*, 477 U.S. at 88; Almendarez-Torres v. United States, 523 U.S. 224, 243–44 (1998).

179. For example, in a First Amendment context, "the Court's movement away from large categories towards adjudication based on individual cases may be characterized as a move from 'rules' to 'standards.'" G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 920 n.231. That standards are less definite than rules does not render standards meaningless. Blakey and Murray note Justice Holmes's observation: "The law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism." *Id.* at 1121 (internal quotation marks omitted) (quoting OLIVER WENDELL HOLMES, *Natural Law*, *in* COLLECTED LEGAL PAPERS 31, 32 (1920). In the context of criminal procedure, the Supreme Court has similarly preferred standards over absolute rules. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 230–31 (1982) (rejecting a rigid test for probable cause determinations in favor of a totality-of-the-circumstances standard); Manson v. Brathwaite, 432 U.S. 98, 112–13 (1977) ("The standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment." (rejecting a per se exclusion of improper eyewitness identifications and adopting a totality-of-the-circumstances approach)). Although in *Miranda v. Illinois*, 378 U.S. 1 (1964), the Court initially opted for a per se prophylactic rule in the context of custodial interrogations, "neither the Supreme Court nor the lower courts have generally taken a rigid approach in the application of Miranda." WAYNE R. LAFAVE, ET AL. CRIMINAL PROCEDURE 340 (4th ed. 2004).

180. *See, e.g.*, JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 26.3 (3rd ed. 1996) (reviewing Eighth Amendment jurisprudence addressing allegedly disproportionate sentences); WAYNE R. LAFAVE, CRIMINAL LAW § 3.5(f) at 176–80 (4th ed. 2003) (reviewing similar jurisprudence concerning disproportionate sentences); *see also, e.g.*, Ewing v. California, 538 U.S. 11, 20 (2003) (applying a "narrow" proportionality review to California's three strikes law); Atkins v. Virginia, 536 U.S. 304 (2002) (applying proportionality review to the execution of the mentally disabled); United States v. Bajakajian, 524 U.S. 321, 333 (1998) (applying proportionality review under the Excessive Fines Clause to a federal forfeiture statute); Harmelin v. Michigan, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (applying a "narrow" proportionality review to a state law imposing a life sentence for certain drug possession offenses); Solem v. Helm, 463 U.S. 277, 291 (1983) (applying proportionality review to South Dakota's recidivism statute); Enmund v. Florida, 458 U.S. 782, 801 (1982) (applying proportionality review to a capital sentence for a certain felony murder conviction); Hutto v. Davis, 454 U.S. 370, 374 & n.3 (1982) (applying proportionality review to a forty-year sentence for possession

of punitive damages in civil cases.[182] Several decisions have already applied this metaphor to guidelines cases,[183] and a more definitive standard would likely develop as federal common law continues to address this issue.[184] For example, notwithstanding the difficulty inherent in resolving claims of disproportionality, the Supreme Court has developed criteria to assist in this analysis for Eighth Amendment claims.[185]

Reliance on due process protections is especially attractive relative to the evidentiary issues and sentencing options likely to emerge if the Supreme Court rules that *Blakely* renders the federal

with intent to distribute nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263 (1980) (applying proportionality review to Texas's recidivism statute); Coker v. Georgia, 433 U.S. 584, 592 (1977) ("We . . . conclude[ ] that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."); Robinson v. California, 370 U.S. 660 (1962) (applying proportionality review to a sentence of ninety days in jail for the crime of being addicted to narcotics); Weems v. United States, 217 U.S. 349, 365–68, 371, 380–81 (1910) (applying proportionality review to a Philippine law requiring punishment of twelve to twenty years hard labor for the offense of falsification by a public official).

181. COOK, *supra* note 180, at § 26.11; *see also Bajakajian*, 524 U.S. at 334–37; Austin v. United States, 509 U.S. 602, 622–23 (1993).

182. *See, e.g.*, B.M.W. of N. Am. v. Gore, 517 U.S. 559, 575 (1996); *see also* PROSSER & KEETON ON TORTS § 2, at 7–15 (W. Page Keeton ed., 5th ed. 1984).

183. *See* United States v. Rebman, 321 F.3d 540, 545 (6th Cir. 2003) (declining to impose sentence "for a homicide under the guise of a guilty plea to the distribution of a very small quantity of drugs"); United States v. Kikumura, 918 F.2d 1084, 1100–01 (3rd Cir. 1990); United States v. Martinez, 234 F. Supp. 80, 88, 90–91 (D. Mass. 2002). Further, other courts have applied a proportionality analysis in requiring clear and convincing evidence when sentencing factors produce dramatically higher penalties. *See* United States v. Lynch, 367 F.3d 1148, 1162 (9th Cir. 2004); *Kikumura*, 918 F.2d at 1102; *see also supra* note 115.

184. As Judge Lynch has observed in a comparable context:

> While some judges might find drawing the line . . . uncomfortably subjective, most of those who have sat on the Supreme Court throughout its history would find such an exercise the essence of the judicial role, much like distinguishing between reasonable and unreasonable searches, cruel and not-so-cruel punishments, speedy and unduly delayed trials, or reasonable and unreasonable time, place, and manner restrictions on freedom of speech, among many other examples. Such line-drawing, even if at the borders it must inevitably draw on the individual judgment of appointed judges, is infinitely preferable to applying formulaic rules in defiance of common sense or practical effect.

United States v. Emmenegger, No. 04 Cr. 334 (GEL), 2004 U.S. Dist. LEXIS 15142, at *47 n.16 (S.D.N.Y. Aug. 4, 2004).

185. *Compare* Solem v. Helm, 463 U.S. 277, 290–92 (1983) (identifying criteria), *with* Lockyer v. Andrade, 538 U.S. 63, 72 (2003) (acknowledging that "[a] gross disproportionality principle is applicable to sentences for terms of years," but stating that "[o]ur cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality").

guidelines unconstitutional. From an evidentiary standpoint, applying *Blakely* to the federal guidelines would dramatically change charging practices and proof at trial, as the guidelines' specific offense characteristics would be transformed into statutory elements that prosecutors must plead and prove. In addition to increasing the risk of retroactive application (thereby provoking an unprecedented volume of filings for post-conviction relief),[186] this will inevitably

186. Justice O'Connor's dissenting opinion in *Blakely* argued that even if *Ring v. Arizona*, 536 U.S. 584, 608 (2002) (holding that *Apprendi* requires that aggravating factors necessary for the imposition of the death penalty be found by a jury, rather than a judge), "does not apply retroactively on habeas review, all criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack." *Blakely*, 124 S. Ct. at 2549 (O'Connor, J., dissenting). Justice O'Connor based her observation on the Supreme Court's decision in *Schriro v. Summerlin*, 124 S. Ct. 2519, 2523 (2004), which declined to give *Apprendi* and *Ring* retroactive effect. *Blakely*, 124 S. Ct. at 2549 (O'Connor, J., dissenting). She implied that habeas petitioners could argue that, given *Apprendi*, the *Blakely* decision may not be characterized as a "new rule," and should, therefore, apply retroactively at least to the date of the *Apprendi* decision. *Id.* In fact, a decision invalidating the federal sentencing guidelines (as applied) could have a far greater retroactive application than Justice O'Connor may have realized. Essentially, even if the Court decides its decision constitutes a new rule, the *Blakely* rule should be treated as a substantive change and therefore receive full retroactive application.

In *Schriro*, Justice Scalia explained that "[n]ew *substantive* rules generally apply retroactively. . . . Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal" *or faces a punishment that the law cannot impose upon him.*'" 124 S. Ct. at 2522–23 (second emphasis added) (quoting Bousley v. United States, 523 U.S. 614, 620 (1988) (quoting Davis v. United States, 417 U.S. 333, 346 (1974))). "New rules of procedure, on the other hand, generally do not apply retroactively." *Id.* at 2523. Justice Scalia further observed: "A decision that modifies the elements of an offense is normally substantive rather than procedural. New elements alter the range of conduct the statute punishes." *Id.* at 2524. Thus, for example, when the Supreme Court issued *McNally v. United States*, 483 U.S. 350, 358 (1987), which modified the definition of mail fraud to exclude certain political corruption cases, the decision applied retroactively to sentences imposed for mail fraud before *McNally* was decided (even to cases on collateral review). *See* United States v. Mitchell, 867 F.2d 1232, 1233 (9th Cir. 1989) ("We agree . . . that *McNally* is fully retroactive . . . ." (citing United States v. Shelton, 848 F.2d 1485, 1488–90 (10th Cir. 1988) (en banc); Ingber v. Enzor, 841 F.2d 450, 453–54 (2d Cir. 1988))).

Apprendi treated certain sentencing factors as "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." 530 U.S. at 494 n.19. Although the *Schriro* Court concluded that *Ring* and *Apprendi* announced only new procedural rules and, thus, did not have retroactive effect to cases no longer on direct review, *Schriro* was only a 5–4 decision. 124 S. Ct. at 2522–23, 2526. Moreover, *Blakely*'s impact on the *federal* sentencing guidelines may be substantive rather than procedural, thereby triggering broader retroactive effect. Specifically, if the Supreme Court's analysis in its pending cases suggests that the federal sentencing guidelines are the functional equivalent of statutory elements, its decision would effectively redefine the crime of conviction. Justice Scalia's burglary example in *Blakely* illustrates this point, as it recognizes burglary committed with a

create new problems at trial. For example, if the Supreme Court, in effect, finds that the federal criminal code also includes the guidelines' specific offense characteristics that potentially increase a defendant's sentence within the statutory maximum, jury instructions incorporating both federal substantive law and the guidelines' provisions will become numbingly complex.[187]

Questions of evidentiary prejudice will also arise in almost every case. For example, subject to narrow exceptions, the Federal Rules of Evidence do not permit prosecutors to admit evidence of a defendant's prior misconduct.[188] However, if a prosecutor is required to allege relevant conduct factors in an indictment, he is entitled to prove them irrespective of their potentially prejudicial effect on the defendant.[189] Of course, the judge may bifurcate the trial, thereby deferring relevant conduct and other specific offense characteristics to the sentencing stage of the proceedings. But problems of this kind would mean that countless cases would require bifurcation.[190] The

gun (i.e., in effect, aggravated burglary, for which the statutory sentence would be forty years) as distinct from burglary committed without a gun (for which the maximum possible sentence would be ten years). *Blakely*, 124 S. Ct. at 2540. Despite any legislative labels designating gun possession during the burglary as a sentencing element, the *Blakely* majority would conclude that gun possession is the functional equivalent of a substantive element that must be found by a jury. *Id*.

If *Blakely* is construed as redefining the statutory elements of the crime of conviction to include sentencing factors—"the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict," *Apprendi*, 530 U.S. at 494 n.19—then defendants whose sentences were enhanced under guideline factors could make a colorable argument that what the sentencing guidelines had designated as aggravating factors subject to judicial fact-finding should be considered elements, or the functional equivalent of elements, of the substantive offense for which they were convicted and thus, that *Blakely* announced a new substantive rule under *Schriro*. *See Schriro*, 124 S. Ct. at 2524. As such, *Blakely* could have broad retroactive application. *Id*. at 2522–23.

187. *See supra* note 158.

188. FED. R. EVID. 404; *see also* Michael Goldsmith, *Resurrecting RICO: Removing Immunity for White-Collar Crime*, 41 HARV. J. ON LEGIS. 281, 286 n.29 (2004) (collecting sources).

189. For example, in RICO cases, prosecutors are required to prove the pattern and enterprise elements. Because the indictment must include these allegations, prosecutors are naturally given leeway to prove them. Such proof, which is very damaging to the defense, is ordinarily deemed too prejudicial to admit in non-RICO cases. Goldsmith, *supra* note 188, at 286 n.27.

190. *See* U.S. Sentencing Comm'n, *Use of Guidelines and Specific Offense Characteristics: FY 2002* (compiling data on the application of specific offence characteristics to a substantial number of sentences); *see also, e.g.*, Jeffrey Standen, *The End of the Era of Sentencing Guidelines:* Apprendi v. New Jersey, 87 IOWA L. REV. 775, 783, 793–94 (2002) (discussing whether relevant conduct could be considered an element of the crime under *Apprendi* and

Supreme Court surely does not want bifurcated criminal trials to become the norm in federal court.[191]

Of course, these problems could be avoided if Congress simply reverts to the purely discretionary, indeterminate sentencing system that preceded the guidelines for more than two hundred years.[192] But this almost certainly will not occur, given the many well-documented problems associated with that approach.[193] Instead, political pressure to ensure higher penalties will likely produce a more severe, determinate sentencing system.[194] Ironically, the *Blakely* decision readily permits that result.

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concluding that if it is, courts could expect to see motions for bifurcation for those sentences based, even in part, on relevant conduct). If Professor Standen's conclusions about bifurcation were right for *Apprendi*, they are even more correct under *Blakely*.

191. On the contrary, the Court has shown considerable concern for preserving the efficiency of the trial process. *Cf.* United States v. Bailey, 444 U.S. 394, 416–17 (1980) (noting "the importance of trial by jury and the need to husband the resources necessary for that process" and characterizing the case as "a good example of the potential for wasting valuable trial resources").

192. *See supra* notes 14–16 and accompanying text. It bears repeating that such systems require no specific fact-finding.

193. *See supra* notes 14–17 and accompanying text. Indeed, there is little evidence that federal judges themselves want to reinstate the pre-guidelines system. *See, e.g.*, United States v. Emmenegger, No. 04 Cr. 334 (GEL), 2004 U.S. Dist. LEXIS 15142, at *25 (S.D.N.Y. Aug. 4, 2004) ("After nearly two decades of Guideline sentencing . . . it is doubtful that any federal court would be comfortable wielding such extraordinary discretion.").

194. As an example of such pressure, James K. Vine, United States Attorney for the Middle District of Tennessee, wrote an opinion piece in a local newspaper arguing that tough mandatory minimum sentencing laws are responsible for "a 30-year low" in crime rates and encouraging resistance to calls to repeal mandatory minimums. James K. Vine, *Nashville Eye: Current Sentencing Policy Protects Safety of Americans*, TENNESSEAN, Aug. 3, 2004, at 9A. The *Tennessean* later reported that despite Vine's claims that the opinion piece was developed primarily in his office, "Sandy Mattice, the U.S. attorney for Tennessee's Eastern District, submitted an Aug. 11 article to *The Chattanooga Times-Free Press* that was nearly identical to Vine's *Tennessean* offering. Another article published in a Guam newspaper by a federal prosecutor there also featured many of the same passages, phrasing and transitions." Rob Johnson, *Opinion Piece Came from Local Office, Attorney Contends*, TENNESSEAN, Aug. 21, 2004. An article in *The Knoxville News-Sentinel* suggests that having local United States Attorneys submit editorials defending mandatory minimums was part of a Justice Department "counteroffensive" aimed at responding to the American Bar Association's recent call to repeal mandatory minimum sentencing. Jamie Satterfield, *DOJ Responds to Minimum Sentence Dissenters*, KNOXVILLE NEWS-SENTINEL, Aug. 18, 2004, at B1. Satterfield quotes Mattice as admitting that the article "was based on a 'model' piece drafted 'by committee' within the Justice Department." *Id.* In any event, it is clear that the Department of Justice is willing to encourage continued support for mandatory minimums. *See also* Orrin Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L.

IV. LIFE WITHOUT THE FEDERAL SENTENCING GUIDELINES: THE SUPREME COURT'S GUIDE TO HIGHER SENTENCES

Blakely ostensibly vindicates the Sixth Amendment right to a jury trial and proof of guilt beyond a reasonable doubt. However, the Court's analysis leaves ample room for a more draconian sentencing system with fewer constitutional protections. Two features of *Blakely* create this potential. First, the majority opinion confirmed prior case law establishing that the Court's Sixth Amendment analysis does not apply to sentencing factors that trigger mandatory minimum penalties.[195] Second, *Blakely*'s rationale does not apply to factors that mitigate, rather than aggravate, punishment.

A. Mandatory Minimums

Prior to *Blakely*, the Supreme Court issued two decisions sustaining the judge's authority to make factual findings attendant to mandatory minimum sentences. In *McMillan v. Pennsylvania*,[196] the Court sustained a state statute that provided a "mandatory minimum sentence of five years' imprisonment if the sentencing judge finds, by a preponderance of the evidence, that the person 'visibly possessed a firearm during the commission of the offense.'"[197] The Court reasoned that due process does not require a jury finding of guilt beyond a reasonable doubt because the Pennsylvania legislature treated visible possession as a sentencing enhancement rather than an element of the offense of conviction.[198] *McMillan* stated that "[s]entencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime . . . without suggesting that those facts must be proved beyond a reasonable doubt."[199]

REV. 185, 192–98 (1993) (discussing the history of mandatory minimum sentencing and some alternatives to mandatory minimums).

195. *Blakely*, 124 S. Ct. at 2540.

196. 477 U.S. 79 (1986).

197. *Id.* at 81; *see also* King & Klein, *Essential Elements*, *supra* note 168, at 1506.

198. *Id.* at 85–86.

199. *Id.* at 92 (citation omitted). *McMillan* stated that "petitioners do not and could not claim that a sentencing court may never rely on a particular fact . . . without finding that fact by 'clear and convincing evidence.'" *Id.* at 91; *see also supra* note 106 and accompanying text (noting unanimous circuit approval of dangerous special offender enhancements under a preponderance of the evidence standard pursuant to judicial fact-finding).

Justice Rehnquist's majority opinion stated that the Pennsylvania mandatory minimum "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm."[200] The Court also stated that petitioners' claim "would have at least more superficial appeal if a finding of visible possession exposed them to *greater or additional* punishment."[201]

In *Harris v. United States*,[202] the Supreme Court subsequently rebuffed a claim that *Apprendi* had implicitly overruled *McMillan*:[203]

> [T]he [*McMillan*] Court noted that the . . . [mandatory minimum] statute "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor."
>
> That reasoning still controls. If the facts judges consider when exercising their discretion within the statutory range are not elements, they do not become [elements] merely because legislatures require the judge to impose a minimum sentence when those facts are found . . . .[204]

In *Blakely*, the Court applied this line of analysis to distinguish mandatory minimum statutes from the Washington law found unconstitutional.[205] *Blakely* thereby confirms that mandatory minimum statutes operate outside the protection of the Sixth Amendment jury trial and burden of proof requirements. Not surprisingly, Congress has already heard one proposal premised on this rationale.[206]

200. *Id*. at 88.

201. *Id*. (emphasis added).

202. 536 U.S. 545 (2002).

203. *Id*. at 556–57 ("*McMillan* and *Apprendi* are consistent . . . .").

204. *Id*. at 559–60 (citations omitted).

205. *Blakely*, 124 S. Ct. at 2538.

206. *See* Blakely v. Washington *and the Federal Sentencing System: Hearing Before the Senate Judiciary Committee*, 108th Cong. (July 13, 2004), *available at* http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=647 (testimony of Frank Bowman) (proposing to "raise the top of guideline ranges to the statutory maximum" and noting that *Blakely* and *McMillan* support the constitutionality of this approach); *see also* Nancy J. King & Susan R. Klein, *Apres Apprendi*, 12 FED. SENTENCING REP. 331 (2000).

B. Potential Congressional Responses

Even if Congress chooses not to enact widespread mandatory minimums, *Blakely*'s analysis creates ample opportunity for increasing sentences. For example, as *Blakely* apparently applies only to factors that potentially increase sentences,[207] mitigating factors fall outside its scope. This is consistent with the Supreme Court's traditional treatment of mitigating factors.[208]

With this in mind, Congress could stiffen penalties by (1) increasing the base offense level for a targeted crime; (2) converting its specific offense characteristics into mitigating factors; and (3) imposing on the defense the burden of proving these mitigating factors.[209] For example, in *Patterson v. New York*, the Supreme Court upheld a New York statute that defined second-degree murder as an intentional killing and placed upon the defendant the burden of proving an affirmative defense ("extreme emotional disturbance") to reduce the crime to manslaughter.[210] The Court reasoned that due process only requires the State to prove each element of a crime beyond a reasonable doubt; consequently "if the State . . . chooses to recognize a factor that mitigates the degree of criminality or punishment, . . . the State may assure itself that the fact has been established with reasonable certainty."[211]

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207. *See supra* notes 77–86 and accompanying text; *see also* Apprendi v. New Jersey, 530 U.S. 466, 501 (2000) (Thomas, J., concurring) ("[A] 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment).").

208. *See Apprendi*, 530 U.S. at 491 n.16 ("[T]he Court has often recognized . . . [the distinction] between facts in aggravation of punishment and facts in mitigation.") (citations omitted).

209. The *Apprendi* majority reasoned that political pressures would deter such legislative measures. *Id.* On the contrary, political pressure is usually exerted to increase penalties. *See, e.g.*, Nora V. Demleitner, *Symposium: Legal Issues and Sociolegal Consequences of the Federal Sentencing Guidelines: First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*, 87 IOWA L. REV. 563 (2002) (discussing political pressures on state sentencing commissions to increase penalties for sexual offenders). Moreover, the proposal in the text is less severe than the alternative of new mandatory minimums.

210. 432 U.S. 197, 206–07 (1977).

211. *Id.* at 209. The Court also quoted extensively Chief Judge Breitel's concurring opinion from the New York State Court of Appeals:

> Nevertheless, although one should guard against such abuses, it may be misguided, out of excess caution, to forestall or discourage the use of affirmative defenses, where defendant may have the burden of proof but no greater than by a preponderance of the evidence. *In the absence of affirmative defenses the impulse to*

Under this reasoning, for example, Congress could reconfigure the fraud guideline as follows: (1) increase the base offense level from seven to thirty-seven, which would set the penalty at the twenty-year statutory maximum; (2) designate the *absence* of current specific offense characteristics as mitigating factors warranting a reduction corresponding with the weight historically assigned to each such factor;[212] and (3) place the burden of proving mitigation on the defendant.

Of course, the *Patterson* court acknowledged constitutional limits on the government's authority to reallocate burdens of proof "by labeling as affirmative defenses at least some elements of the crimes now defined in . . . statutes."[213] However, this constraint would not apply to the guidelines' *mitigating* adjustments and specific offense characteristics, which are not statutory elements.

> *legislators, especially in periods of concern about the rise of crime, would be to define particular crimes in unqualifiedly general terms, and leave only to sentence the adjustment between offenses of lesser and greater degree. In times when there is also a retrogressive impulse in legislation to restrain courts by mandatory sentences, the evil would be compounded.*
>
> The affirmative defense, intelligently used, permits the gradation of offenses at the earlier stages of the prosecution and certainly at the trial, and thus offers the opportunity to a defendant to allege or prove . . . the distinction between the offense charge and the mitigating circumstances which should ameliorate the degree or kind of offense. . . .
>
> In sum, the appropriate use of affirmative defenses enlarge the ameliorative aspects of a statutory scheme for the punishment of crime rather than the other way around – a shift from primitive mechanical classifications based on the bare antisocial act and its consequences rather than on the nature of the offender and the conditions which produce some degree of excuse for his conduct.

Id. at 211–12 n.13 (emphasis added) (internal quotation marks omitted) (quoting People v. Patterson, 347 N.E.2d 898, 909–10 (N.Y. 1976)). Viewed in this light, the federal sentencing guidelines serve an ameliorative function akin to affirmative defenses. Relative to mandatory minimums, for example, this is especially true.

212. For example, starting with an offense level of thirty-seven, the guidelines could authorize the following reductions for mitigating factors: if the offense involved fewer than ten victims, decrease by two levels, U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(2); if the offense did not involve "theft from the person of another," decrease two levels, *id.* § 2B1.1(b)(3); if the offense did not involve a misrepresentation that the offender "was acting on behalf of a charitable organization," decrease by two levels, *id.* § 2B1.1(b)(7)); if the defendant did not "relocate[], or participate[] in relocating a fraudulent scheme to another jurisdiction to evade law enforcement," decrease by two levels, *id.* § 2B1.1(b)(8)); if the offense did not involve "production or trafficking of any unauthorized . . . counterfeit . . . device," decrease by two levels, *id.* § 1B.1.1(b)(9)); if the loss was less than $5,000, decrease by twenty levels, *id.* § 2B1.1(b)(1)). This calculation would produce a thirty-level reduction to a base offense level of seven and a corresponding sentencing range of zero to six months.

213. Patterson v. New York, 432 U.S. 197, 210 (1977).

Rather than defining any crimes, mitigating adjustments and specific offense characteristics merely assign specified weights to certain factors that reduce punishment due to the way in which the crime occurred.[214]

The foregoing examples demonstrate that applying *Blakely* to the federal guidelines will probably not produce an era of enlightened sentencing reform. Thus, whatever their flaws, the federal sentencing guidelines are preferable to their most likely alternatives. Indeed, at least one federal judge has wisely concluded that Churchill's adage about democracy also applies to the federal guideline system: "It is the worst possible way to sentence a defendant, except for all the others."[215] With this in mind, the Supreme Court should not apply unprecedented constitutional analysis to invalidate them.

V. CONCLUSION

As a former commissioner, I acknowledge that the federal sentencing guidelines are imperfect. But they also have their virtues, and, in any event, their flaws do not render them unconstitutional. The guidelines have reduced unwarranted sentencing disparity.[216] They provide a measure of predictability in sentencing,[217] ensuring

214. *See* U.S. SENTENCING GUIDELINES MANUAL § 2X1.1(b) (2003) (reduction for incomplete attempt); *id.* § 3B1.2 (downward adjustment for "mitigating role"). Amendment 2 of the 2003–04 Amendment Cycle modifies § 2G2.2(b)(1) of the guidelines such that a reduction for possession of, rather than trafficking in, child pornography "is warranted, if the defendant establishes that there was no intent to distribute the material." 69 Fed. Reg. 28,994, 29,006 (May 19, 2004).

215. Judge Stuart Dalzell, *One Cheer for the Guidelines*, 40 VILL. L. REV. 317, 334 (1995); *see* WINSTON CHURCHILL, THE WIT AND WISDOM OF WINSTON CHURCHILL 28 (James C. Humes ed., HarperPerennial 1995); *see also, e.g.*, Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (And a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1017 (2004).

216. For example: "In 2002, there was no statistically significant effect from race and ethnicity on sentencing length. When we control for effects of legally relevant factors such as mandatory minimums, race and ethnicity likewise show no substantial effect on sentencing today." Telephone Interview with Paul J. Hofer, Senior Research Associate, U.S. Sentencing Commission (Aug. 26, 2004); *see also* Paul J. Hofer, Kevin R. Blackwell & R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 288–89 (1999) (discussing study finding that guidelines reduced interjudge disparity); James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271 (1999) (same).

217. *See generally* Goldsmith & Gibson, *The U.S. Sentencing Guidelines: A Surprising Success*, *supra* note 55.

an open process in which offenders can know the basis for their sentence and have the right to appeal erroneous applications.[218] Relative to mandatory minimums, the guidelines also permit judges to retain at least some sentencing discretion, including the ability to depart in exceptional circumstances.

Of course, these virtues do not necessarily ensure the guidelines' constitutionality, and I recognize that the defense bar seeks to invalidate them. Indeed, Justice Scalia's majority opinion in *Blakely* emphasized this point.[219] *Blakely*, however, renders the federal guidelines unconstitutional only if the Supreme Court is willing to disregard more than two decades of its own jurisprudence as well as critical features that distinguish these guidelines from the statutes in both *Blakely* and *Apprendi*. To guideline opponents who choose to ignore these distinctions in the hope of promoting sentencing reform, I respectfully suggest that "when the gods wish to punish us, they answer our prayers."[220]

218. 18 U.S.C. § 3742 (2003).

219. 124 S. Ct. at 2542 (referencing the position of *amicus* brief of the National Association of Criminal Defense Lawyers).

220. OSCAR WILDE, AN IDEAL HUSBAND, act 2 (1895), *reprinted in* PLAYS, PROSE WRITING AND POEMS 329, 361 (Anthony Fothergill ed., Everyman 1996) (Sir Robert Chiltern speaking to Lord Goring). Wilde also wrote: "In this world there are only two tragedies. One is not getting what one wants, and the other is getting it. The last is much the worst . . . ." OSCAR WILDE, LADY WINDERMERE'S FAN, act 3, sc. 3 (1892), *reprinted in* PLAYS, PROSE WRITING AND POEMS 167, 210 (Anthony Fothergill ed., Everyman 1996) (Dumby speaking to Lord Darlington); *cf.* Bowman, *supra* note 31, at 732 (warning critics to "be careful what you wish for because you might get it").